

Marketing Privacy: A Solution for the Blight of Telemarketing (and Spam and Junk Mail)

Ian Ayres* and Matthew Funk**

Abstract. Unsolicited solicitations in the form of telemarketing calls, email spam and junk mail impose in aggregate a substantial negative externality on society. Telemarketers don't bear the full costs of their marketing because they do not compensate recipients for the hassle of, say, being interrupted during dinner. Current regulatory responses that give consumers the all-or-nothing option of registering on the internet to block all unsolicited telemarketing calls are needlessly both over- and under-inclusive. A better solution is to allow individual consumers to choose the price per minute they would like to receive as compensation for listening to telemarketing calls. Such a "name your own price" mechanism could be easily implemented by crediting consumers' phone bills (a method analogous to the current debits to bill from 1-900 calls).

Under this rule, consumers are presumptively made better off by a regime that gives them greater freedom. Telemarketing firms facing higher costs of communication are likely to better screen potential contacts to find consumers who are more likely to be interested in their solicitation. Consumers having the option of choosing an intermediate price will receive fewer calls, which will be more tailored to their interests and will be compensated for those calls they do receive.

But giving consumers the right to be compensated may also benefit some telemarketers. Once consumers are voluntarily opting to receive telemarketing calls (in return for tailored compensation), it becomes possible to deregulate the telemarketers – lifting current restrictions on the time (no night time calls) and manner (no recorded calls). For example, if the prohibition against tape-recorded messages were repealed, we could imagine local grocery stores or movie theaters using the telephone to provide consumers with useful information about specials. And faced with increasing caller resistance, we imagine that survey groups, such as the Gallop Poll, might welcome the opportunity to compensate survey respondents so that they might be able to produce more representative samples.

We apply similar "name your own price" solutions to internalize the externalities of unsolicited spam email and junk mail.

* Townsend Professor, Yale Law School.

** Matthew Funk is an attorney at Simpson, Thacher & Bartlett and a research associate at Dartmouth College's Institute for Security Technology Studies. Russ Atkind, Jennifer Brown, Ken Eichenbaum, Peter Siegelman Phil Spector and Nasser Zakariaya provided helpful comments.

Table of Contents

<u>Introduction</u>	<u>3</u>
<u>I. The Problem</u>	<u>8</u>
<u>II. The Market Solution</u>	<u>26</u>
<u>A. Comparison With Improved Initial Disclosure</u>	<u>34</u>
<u>B. Comparison With Private and Public Interdiction</u>	<u>37</u>
<u>C. Theoretical Critiques of Privacy Markets</u>	<u>45</u>
<u>1. Sunstein's Concern With Excessive Filtering</u>	<u>45</u>
<u>2. Radin's Concern with Commodification</u>	<u>50</u>
<u>3. Allen's Concern With Uncoerced Privacy</u>	<u>55</u>
<u>III. Implementation</u>	<u>59</u>
<u>A. Our Preferred Approach</u>	<u>60</u>
<u>B. The Pricing Mechanism</u>	<u>63</u>
<u>1. Who Should Offer the Price</u>	<u>64</u>
<u>2. Default Choice</u>	<u>66</u>
<u>3. Opt-Out Rules</u>	<u>69</u>
<u>C. Exempt Solicitations</u>	<u>71</u>
<u>1. Positive Externalities: Charities, Polling and Politics</u>	<u>71</u>
<u>2. Policing "Consumer Consent"</u>	<u>78</u>
<u>D. Constitutionality</u>	<u>80</u>
<u>IV. Applications to Junk Mail and Spam</u>	<u>86</u>
<u>Conclusion</u>	<u>88</u>

Marketing Privacy: A Solution for the Blight of Telemarketing (and Spam and Junk Mail)

“[T]he right of every person ‘to be let alone’ must be placed in the scales with the right of others to communicate.”

..... - *Rowan v. Post Office Department*, 397 U.S. 728, 736 (1970).

Introduction

The billions of telemarketing calls that individuals endure each year are in aggregate a substantial invasion of residential privacy.¹ Who hasn't been interrupted at the dinner table by an unwanted call pitching storm windows or mortgage refinancing? We all have stories of particularly outrageous or obnoxious calls.² Virtually no one likes the current system. We know telemarketing calls are a major pain. What goes unnoticed, however, is that these unwanted intrusions may represent the most frequent intrusion on people's fundamental right to be left alone in their homes.

Telemarketers don't bear the full costs of their marketing because they do not compensate recipients for the hassle of, say, being interrupted during dinner. Telemarketers bear the cost of their

¹ A discussion of the number of telemarketing calls can be found *infra* note 31 and accompanying text.

² See e.g., John Greenwald, *Sorry, Right Number. (Telemarketers)*, TIME, September 13, 1993, at 66 (relating story of a doctor being called away from surgery by a telemarketer); Don Oldenburg, “Anti-Telemarketers Send Out a Very Busy Signal,” WASHINGTON POST, Feb. 20, 2002, C1 (describing how telemarketers interrupted “a multimillion-dollar international deal in 1994 to feed starving children in Bosnia”).

speaking, but not of residents' listening³ It can still be privately rational for a telemarketer to disturb 30 people, if he or she can succeed in making a high-profit sale to the 31st. Because of these externalized costs, telemarketers have an incentive to call too often. The traditional laissez faire approach has perversely created a public commons in an important aspect of domestic privacy—the residential telephone lines that literally reach into the most intimate spaces and moments of our lives.

The current legislative movement to combat this telemarketing abuse—promoting “don’t call” statutes—forces residents to make an unreasonable all-or-nothing choice: either they register on the state’s “don’t call” list and thereby opt out of all for-profit telemarketing calls or they remain subject to potentially unlimited telemarketing harassment. “Don’t Call” statutes have already been passed by twenty states and are in the works in four more.⁴ Moreover, the FTC has just proposed promulgating a national “don’t call” registry that would give every U.S. citizen this all-or-nothing choice.⁵

While the “don’t call” registries are improvements over the status quo, they are unnecessarily

³ This point of cost externalization is powerfully made in an excellent article by Ross Petty that repay close reading. Ross D. Petty, *Marketing Without Consent: Consumer Choice and Costs, Privacy and Public Policy*, 19 J. Pub. Pol’y & Marketing 42 (2000).

⁴ See *Telephone Rules*, State of Alabama, Public Service Commission, Dec. 10, 1992, available at <<http://www.psc.state.al.us/Administrative/telephonerulesoct6.doc>>; ALASKA STAT. § 45.50.475 (Michie 2001); ARK. CODE ANN. § 4-99-404 (Michie 2001); CAL. BUS. & PROF. CODE § 17592 (West 2002); COLO. REV. STAT. ANN. § 6-1-902 (West 2001); CONN. GEN. STAT. ANN. § 42-288a (1997) (amended 2001); FLA. STAT. ANN. § 501.059 (West 2001); GA. CODE ANN. § 46-5-27 (2001); IDAHO CODE § 48-1003 (2001); IND. CODE ANN. § 24-4.7-1 (West 2001); KY. REV. STAT. ANN. § 367.46955 (Banks-Baldwin 2001); LA. REV. STAT. ANN. § 45:844.14 (West 2002); ME. REV. STAT. ANN. tit. 32, § 14716 (West 2001); MO. ANN. STAT. § 407.1098 (West 2001); N.Y. GEN. BUS. LAW §399-Z (McKinney 2002); OR. REV. STAT. § 646.569 (2001); TENN. CODE ANN. §65-4-405 (2001); TEX. BUS. & COM. CODE ANN. § 43.101 (West 2001); **WISC. CODE** §100.52 (2001) ; WYO. STAT. ANN. § 40-12-302 (Michie 2001). As of October 2001, “no call” list legislation was pending in Michigan, New Jersey, Pennsylvania, and Ohio. See DianaMey.com, *State Telemarketing Laws* (last modified Oct. 2001) <http://www.dianamey.com/State_telem_laws.html>.

⁵ Oldenburg, *supra* note 2.

over- and under-inclusive. Many of the residents who opt for “don’t call” status receive too few calls compared to what they would want if they were compensated; similarly, many of the residents that fail to register receive too many calls relative to what they would prefer if the telemarketers had to compensate them.

This article proposes to expand residents’ choices. Households should be allowed to decide how much they will be compensated for receiving telemarketing calls.⁶ It’s technologically feasible to give households the ability to determine how much they will be compensated per minute for listening to a telephone pitch. This approach would allow consumers to recreate the effect of the current law by choosing either an infinite or a zero price.

But many consumers will choose intermediate amounts. Telemarketing like other forms of advertising can provide useful information to potential consumers. And telemarketers who have to compensate consumers have greater incentives to screen their call lists to focus their calling on consumers who are more likely to be interested in the information.

The result is a boon to consumers. On simple libertarian grounds, consumers are presumptively made better off by a regime that gives them greater freedom. More concretely, consumers will (1) receive fewer calls, (2) which will be more tailored to their interests and (3) be compensated (with amounts that they themselves have indicated are sufficient) for those calls they do receive.

This “name your own price” system may also benefit some telemarketers—even though they have to start compensating listeners. For some firms, our system would represent an increase in

⁶ We initially filed a provisional patent application for a “name your own price” telemarketing mechanism on October 3, 2000. But we hereby renounce and waive any financial interest in the intellectual property. We hope to make the idea as free as the air.

telemarketing freedom. Instead of prohibiting telemarketers from calling people on the “don’t call” list, telemarketers could call anyone—as long as they were willing to pay the person’s (potentially infinite) price. Even without the “don’t call” statutes, many people have privately opted out of the pools by making their numbers unlisted or by immediately hanging up on all such calls. Indeed, it has become something of a national pastime for consumers to devise new ways to detect and terminate telemarketing intrusions. But this current rush to judgment prevents even socially beneficial solicitations from being heard. Giving telemarketers the option of compensating consumers represents a new way for the most beneficial parts of the telemarketing industry to overcome consumer resistance. For example, we imagine that the Gallup Organization might welcome the opportunity to compensate survey respondents so that the polling firm could produce more representative samples.

Our system might also benefit telemarketers by making it possible to deregulate other aspects of the telemarketing industry. Federal law currently prohibits telemarketers from calling between 9 p.m. and 8 a.m..⁷ and many states prohibit tape-recorded solicitations.⁸ These laws make eminent sense in a world where consumers are not compensated. But in a world with consumer consent—in which consumers volunteer (for compensation) to listen to telemarketing solicitations—there is no longer a reason for such per se prohibitions. As a technological matter there is no reason why consumers couldn’t set different prices for different times of day or different types of solicitations. If the prohibition against tape-recorded messages were repealed, we could imagine local grocery stores or movie theaters using the telephone to provide consumers with useful information about specials. These

⁷ See FTC Restriction on Telephone Solicitations, 47 C.F.R. § 64.1200(e)(1) (2002).

⁸ See e.g. CONN. GEN. STAT. ANN. § 42-288a(c)(4); see also Telephone Consumer Protection Act of 1991, 47 U.S.C.A. § 227 (b)(1)(B) (West 2001) (prohibiting initiating solicitations with a pre-recorded message).

telemarketers would have to pay the listeners, but with tape-recordings they would dramatically reduce the costs of speaking.

Make no mistake, we predict that some types of telemarketing calls would be driven into the dust bin of history by a system of mandated compensation. And a good thing too. Many telemarketing calls are not cost-justified when one takes into account the real costs of listening. Telemarketers under the current system don't take into account the annoyance of the 50 consumers who fail to buy when they are trolling for the consumer who will bite. And perversely, the new "don't call" laws exacerbate the overfishing problem—as telemarketers concentrate their attention on those consumers who fail to register. The likely result of this phenomenon is an inefficient unraveling—with too little telemarketing for those who register and too much for those who fail to register.

The technology for such a compensated-telemarketing system is no more complicated than existing 1-900 numbers. Under our preferred scheme, the telemarketers would be required to call from an "outgoing 1-900 number." With existing 1-900 numbers a payment from the caller to the recipient is triggered when the caller dials into a 1-900 number. But with an outgoing 1-900 number, transfers based on a per-minute fee set by consumers would be made from the telemarketer to the consumer's telephone bill when the telemarketer calls out from a 1-900 number.

This paper is divided into four parts. First, we address the problems of externalized costs created by the current laissez faire regime governing solicitation. Part II provides the affirmative case for creating a market in the right to be left alone. We explain the superiority of a market approach to alternative regimes and respond to a series of theoretical critiques found in the writings of Anita Allen, Peggy Radin and Cass Sunstein. Part three then goes on to discuss the details of

implementation—including both voluntary and mandatory versions of our compensation system. We take on legal and practical challenges to making our mechanism work. Finally, part four considers how this “name your own price” solution could be analogously used to mitigate the problems of spam and junk mail.

I. The Problem

Consumers, legislators and academics typically regard most kinds of direct marketing—unsolicited solicitations arriving by telephone, mail or the Internet—as a nuisance.⁹ Legal scholars at least will recognize that this view makes sense given the formal as well as the colloquial meanings of the term—many direct marketing solicitations are not only irritating, they are also more burdensome to the recipient than beneficial to the sender. Parties that view solicitations as a nuisance naturally focus on developing methods for blocking it.

As emphasized above, this is a nuisance of a particularly important character. While many of us have gradually become inured to the unpleasant reality of telemarketing calls, it is useful to remember

⁹ This connection between parties' interpretation of the problem and the solution is especially visible in regard to spam. Email advertising has many virtues: it costs virtually nothing to create and disseminate; it is instantaneous, environmentally friendly, and relatively unintrusive; and it places recipients just a click away from the point-of-sale. Yet well-known Internet personalities and the online community as a whole deride spam as a “time- and money-wasting mess” and regard its usage as a violation of online norms. Anne E. Hawley, *Taking Spam Out of Your Cyberspace Diet: Common Law Applied to Bulk Unsolicited Advertising via Electronic Mail*, 66 UMKC L. Rev. 381, 382 n.11 (1997) (quoting Ried Kanaley, *Sorting Out the Spam Issues Behind Stopping Junk Email*, BUFFALO NEWS, Aug. 5, 1997, available in 1997 WL 6452760). Unsurprisingly, therefore, Internet Service Providers (ISPs) have generally sought to deal with spam by installing filters that exclude it from users' inboxes. Groups of programmers, meanwhile, have created devices such as the Open Relay Blocking System and the MAPS Realtime Blackhole List that block not merely individual pieces of spam but all email from servers that host spammers or relay their advertisements. See Lawrence Lessig, *The Spam Wars*, THE STANDARD.COM, (Dec. 31, 1998) <wysiwyg://48/http://www.thestandar...rticle/display/0,1151,3006,00.html>. Although there is no federal law governing spam, several legislative initiatives are currently underway to allow recipients to “opt-out” of receiving junk email. See e.g. CAN Spam Act of 2001, S.630, 107th Cong. (2001) (requiring senders of unsolicited commercial emails to have a valid return address so that consumers can request removal from the mailing list). State legislation is also pending, though the movement to restrict spam seems to have lost steam in recent years. See e.g. H.B. 4581, 181st Gen. Ct., Regular Session (Ma. 1997) (limiting commercial email solicitations to those with whom a sender has a pre-existing business relationship; not enacted). Because they view spam as a nuisance, these parties have fought to keep it off the Net.

that this nuisance implicates the most basic sort of privacy—the right to be left alone in one’s home.

Unlike other nuisances that need only seep across our property lines to be actionable, the telemarketing nuisance intrudes literally into the most intimate parts of our homes—our bedrooms, our kitchens our living rooms—because these are the very places where we want telephones to give us ready access to our friends and family and *solicited* contacts with the marketplace.

Federal law first recognized the nuisance of telemarketing in 1991. The Telephone Consumer Protection Act (TCPA), the first and still the most important federal legislation regulating telemarketing, found that “[m]any customers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers.”¹⁰ The TCPA authorized the FCC to bar telemarketers from calling consumers who registered their phone numbers with a nationwide don’t-call list—and prohibited telemarketers from soliciting any consumers during the night or early morning. An intense lobbying campaign by the direct marketing industry convinced the FCC to adopt a similar but less consumer-friendly version of the don’t-call approach. In place of a national don’t-call list, the FCC issued regulations providing that when a consumer asks a specific telemarketer to stop calling, the telemarketer is legally bound to comply with the request. Meanwhile, twenty states have created their own don’t-call lists.¹¹ These state laws mirror Congress’s assessment of the problem as well as its problem-solving approach.¹² Academics to date have also focused on blocking phone solicitations. All but one of the

¹⁰ 47 U.S.C.A. § 227. United States Senator Earnest “Fritz” Hollings stated the point more poetically during his introduction of the Automated Telephone Consumer Protection Act; he observed, “They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone right out of the wall.” **137 CONG. REC. 30,821 (1991).**

¹¹ See *supra* note 4.

¹² See e.g. CONN. GEN. STAT. ANN. § 42-288a (1997) (amended 2001) (creating a don’t-call list and restricting the hours that a telemarketer may call).

scholarly articles dedicated to reforming telemarketing recommends amplifying the don't-call approach by requiring consumers to opt-in (instead of opt-out) or creating a nationwide list.¹³ In each case, long anecdotes depicting telemarketing calls as a nuisance precede the authors' recommendations that government should do more to suppress it.¹⁴

Unsolicited calls about magazine subscriptions and travel packages—much less emails advertising get-rich-quick schemes and hardcore pornography—are indeed annoying. But approaches that begin from the premise that telemarketing, spam and other kinds of direct marketing are a nuisance obscure the real problem: direct marketing is frequently a nuisance (in the formal sense of the term) because the legal regime does not compel direct marketers to internalize the full costs of their activities.¹⁵

¹³ See, e.g., Joseph R. Cox, *Telemarketing, The First Amendment, and Privacy: Expanding Telemarketing Regulations Without Violating the Constitution*, 17 HAMLINE J. PUB. L. & POL'Y 403, 421-22 (1996); Mark S. Nadel, *Rings of Privacy: Unsolicited Telephone Calls and the Right of Privacy*, 4 YALE J. ON REG. 99, 101, 121-27 (1986); Jeff Sovern, *Opting In, Opting Out, or No Options at All: The Fight for Control of Personal Information*, 74 WASH. L. REV. 1033 (1999).

¹⁴ The opening paragraph of Cox, *supra* note 13, at 403, is typical:

How often does it happen to you? You sit down to have dinner in the early evening, probably enjoying pleasant conversation with your family, when the phone rings. The caller asks for you or your spouse by first name. But you know it is not a friend; you have been through this routine too many times. "What are you selling?" you ask. The caller laughs gently and suggests that nothing is for sale, this is merely a "courtesy call." The caller asks if you have ever thought about aluminum siding for your house. Yes, you reply, you thought about it fifteen years ago when you had it installed. If it is not aluminum siding being peddled, it is credit cards, newspaper subscriptions, long distance service or any number of products or services you either already have or are not interested in obtaining. And perhaps like many people, even if you happened to be interested in the product or service, you would not purchase it over the phone during dinner.

For other examples, see Nadel, *supra* note 13, at 99 and Sovern, *supra* note 13, at 1069-70.

¹⁵ In this section, we seek to prove not only that the current legal regime fails to account for important negative externalities but also that it creates a tragedy of the commons. The externalities alone justify our proposal to create a privacy market. The tragedy of the commons argument attempts to show why our approach is in the direct marketers' long-term interests.

Direct marketing imposes costs not merely on the businesses that speak, but also on the consumers who listen.¹⁶ And though it is hard to quantify the cost of sorting through the advertisements that accumulate in one's inbox during a vacation, these kinds of intrusions provoke strong emotions among consumers. For example, the first large-scale use of spam—by a pair of attorneys, no less—provoked so many angry responses (or “flames”) that the replies overloaded the spammers' ISP, provoking a temporary shutdown.¹⁷ Most consumers' frustration with spam, moreover, pales compared to their exasperation when they receive a telemarketing call during dinner.¹⁸

Because direct marketers do not internalize the full costs of their behavior, they solicit an excessively broad audience. Direct marketers have access to considerable information about individuals' buying habits. This information allows them to assess whether a particular consumer is likely to purchase a specific product. But since direct marketers do not pay the costs they impose on

¹⁶Spammers also externalize the cost of transmitting their solicitations. Spammers do not even reimburse ISPs for the cost of transmitting email advertisements. These costs can be substantial. ISPs report that nearly two dollars of each customer's monthly bill is attributable to spam. See Daniel P. Dern, *Spam Costs Internet Millions Every Month*, INTERNET WK. May 4, 1998, available at www.techweb.com/se/directlink.cgi (visited Apr. 8, 2001).

¹⁷ See Susan B. Ross, *Netiquette: Etiquette Over the ABN and the Internet*, 33 ARIZ. ATT'Y 13 (1996).

¹⁸ Numerous public opinion surveys demonstrate that most consumers resent telemarketing. In one poll, 47% of respondents indicated that telephone solicitations are “always an intrusion,” while another 32% stated these solicitations were “mostly an intrusion.” *Executive Summary: 1998 Privacy Concerns and Consumer Choice Survey* (visited Dec. 17, 1998) <www.privacyexchange.org/iss/surveys/1298execsum.html>, cited in Sovern, *supra* note 13, at 1058 n.136. Another poll, commissioned by Pacific Telephone Company, reported that 86.9% of respondents found sales calls annoying. Field Research Corp., *The California Public's Experience with and Attitude Toward Unsolicited Telephone Calls* 9 (Mar. 1978) (unpublished report prepared for the Pacific Telephone Company), cited in Nadel, *supra* note 13, at 100 & n.8. See *infra* note 69 for additional survey results showing that a majority of consumers regard telemarketing as a serious invasion of privacy. See also Raj Mehta & Eugene Sivadas, “Direct Marketing on the Internet: An Empirical Assessment of Consumer Attitudes,” 9 J. of Direct Marketing 3 (1995).

consumers (and ISPs), they are less discriminating than they should be. When the publisher of a horse racing magazine solicits consumer who have not heretofore demonstrated any interest in the sport, that call or email probably is not cost-justified if the total social costs and benefits are reckoned. But if the publisher only calls or emails those persons who have wagered at OTB or purchased round trip tickets to Kentucky during early May, then there is a stronger likelihood that the benefits of the solicitation to the consumer and the publisher will outweigh the costs. Direct marketing is often net social waste because the legal system does not give sellers of niche products adequate incentive to target likely customers.

The most striking manifestation of this phenomenon is the fact that a substantial number of direct marketers make no effort whatsoever to screen their lists of offerees. These merchants frequently try to sell products appropriate for a narrow subset of consumers to everyone they can mail or phone. This phenomenon is most common on the Internet, where the non-reputational cost to the seller of sending a piece of spam to an additional consumer approaches zero. Emailing everyone is cheaper than paying to distinguish the likely prospects and usually generates at least a few additional sales.¹⁹ Though the marginal cost of a solicitation is higher for telephone solicitation than spam, many telemarketers use the

¹⁹ See Derek D. Simmons, Comment, *No Seconds on Spam: A Legislative Prescription to Harness Unsolicited Commercial Email*, 3 J. SMALL & EMERGING BUS. L. 389, 392 n.4 (1999) (“Taking into account the labor cost of paring a mass list to a smaller list of only the most likely customers, the mass emailing without tailoring the list is far less expensive.”); Simon Garfinkel, *Spam King! Your Source for Spams Netwide!*, WIRED, Feb. 1996, at 64, 66, available at <http://www.wired.com/wired/archive/4.02/spam.king.html> (quoting spammer Jeff Slaton: “It’s just as cost-effective for me to send to 6 million email addresses as to 1 million email addresses, so why bother being selective? In fact, prequalifying a prospect is a dangerous thing, simply because you might well miss a whole group of people out on the fringe.”)

White Pages to compile their calling lists.²⁰ These companies have been distributing phonebooks (electronic or otherwise) to their salespeople ever since the federal government enacted regulations that effectively proscribed the use of automatic devices that sequentially dialed every combination of seven numbers in an area code.²¹

The prevalence of another automatic calling device underscores the fact that telemarketers do not internalize the negative externalities they create.²² The overwhelming majority of telemarketers use a technology called predictive dialers (or autodialers).²³ These devices simultaneously dial batches of phone numbers and then route calls to salespeople when a consumer answers the phone. When too many consumers answer at once, the devices drop the surplus calls.²⁴ Nynex (now Verizon) has reported that the company receives 600 complaints per week about hang-ups that the company attributes to predictive dialers.²⁵ Telemarketers would be less likely to operate these devices at a rate fast enough to generate large numbers of hang-ups if they internalized the cost to consumers of rushing

²⁰ See *Antitelemarketer.Com, Methods of Antitelemarketing* (visited Feb. 7, 2002) <<http://www.antitelemarketer.com/index2k1.htm>>.

²¹ The TCPA bans telemarketing calls without prior consent to emergency telephone lines such as poison control hotlines, patients' telephone numbers at health care facilities and pagers, cellular phones, or similar devices. It also bars auto-dialing machines from simultaneously engaging more than one of a business's phone lines. To the extent they are enforced, these regulations force telemarketers to use automatic dialing machines with at least a small measure of nuance.

²² Telemarketing costs also impose congestion costs on the recipient caller. When telemarketers occupy a phone line, no other call can get through. While this congestion cost is of second-order concern, in aggregate the costs of delayed or missed calls can be substantial.

²³ See Patricia Wen, *All Those Hang-Ups Might Be a Computer Calling*, BOSTON GLOBE, Apr. 21, 1997, at B1, reprinted at <http://www.stopjunkcalls.com/bglobe.htm>.

²⁴ See *id.* Bob Bulmash, founder of Private Citizen, Inc., observes that predictive dialers hang up on 5 to 40 percent of consumers, depending on how a company sets them up. Oldenburg, *supra* note 2. Dennis Hawkins, *Tired of Hang Up Calls?*, (visited Feb. 8, 2002) <http://www.antitelemarketer.com/hang_up_calls.htm>, observes that other problems with these devices are the fact that they interfere with Caller-ID and will continue calling the same consumer until he has answered the phone and been routed to a salesperson.

²⁵ See Wen, *supra* note 23.

to answer the phone and hearing nothing but a dial tone when they picked up the receiver.²⁶

Another indication that the current legal regime does not account for the negative externalities associated with direct marketing is the sheer volume of solicitations. While there is no definitive measure of the amount of telemarketing, all of the estimates are substantial. When it passed the TCPA in 1991, Congress found that 30,000 telemarketing firms were making more than 6.5 billion calls per year. That would mean U.S. households were receiving 18 million calls per day.²⁷ The FBI now estimates that there are 140,000 telemarketing firms in the United States.²⁸ If the number of calls per firm has remained constant (vis-à-vis the TCPA findings), then telemarketing firms would be making 30 billion calls per year—approximately 0.8 calls per household per day.²⁹ In fact, technological advances

²⁶ Catherine Romano, *Telemarketing Grows Up*, 87 MGMT. REV. 31, 33 (1998), available at http://ehostvgw18.epnet.com/get_xml.asp?booleanTerm=telemarketing+and+grows+and+up&fuzzyTerm=&hitNum=1&AN=705223&ISSN=00251895&resultsetId=R00000011&Page=F&db=Business+Source+Premier, notes that the hang-ups occur because many telemarketers set their predictive dialers at too fast a pace.

Yet another irritating technique that might well disappear if telemarketers were compelled to internalize the costs they impose on consumers is the practice of leaving lengthy pitches on voicemail and answering machines. See *id.* at 34; Amy Wu, *Leave Your Pitch After the Beep*, ABCNews.Com, (visited Feb. 8, 2002) <<http://abcnews.go.com/sections/business/DailyNews/telemarket990923.html>>., for more information about “voicemail telemarketing.”

²⁷ 47 U.S.C.A. § 227.

²⁸ Gene Haschak, *Beware of money scams that prey on older adults*, CHICAGO DAILY HERALD, Mar. 16, 2001, at 2 (citing FBI statistics). The telemarketing industry has enjoyed enormous growth during the last decade. Direct Marketing Association, *2000 Economic Impact: U.S. Direct Marketing Today Executive Summary: Key Findings*, available at <http://www.the-dma.org/library/publications/libres-ecoimpact2.shtml>.

²⁹ Calculation based upon approximately 105 million U.S. households as measured by the 2000 Census. See U.S. Census Bureau, *American Fact Finder, Households* (visited Feb. 8, 2002) <http://factfinder.census.gov/servlet/DTTable?_ts=31246255641>.

allow individual telemarketers to make many more sales calls per day.³⁰ This phenomenon lends credibility to statements by consumer advocates and telemarketing experts suggesting that consumers receive an average of two or more calls per day.³¹

The enormous—and growing—volume of solicitations³² not only irritates consumers but also seems likely to damage the long-term business prospects of most telemarketers. Telemarketers are in

³⁰ See *infra*, note 38 (citing sources). According to industry estimates, America's ten largest telemarketing companies now have the capacity to call every U.S. phone number once a month. See Brian Brueggemann, *Illinois State Representative Introduces Anti-Telemarketer Bill*, BELLEVILLE NEWS-DEMOCRAT, Dec. 29, 2000 at 1.

³¹ Consumer advocacy websites report that the average American receives two to three calls per day from telemarketers. *E.g.* Telemarketing Statistics (visited Feb. 21, 2002) <<http://www.dianamey.com/Telemarketingstats.html>>; Telemarketing Stats (visited Feb. 21, 2002) <http://www.callmenot.com/about_stats.phtml>; Did You Know...? (visited Feb. 21, 2002) <<http://www.tommabe.com/facts.php>>; antitelemarketer.com: Facts You Should Know About Telemarketing (visited Feb. 21, 2002) <<http://www.antitelemarketer.com/facts.htm>>. James R. Rosenfield, one of America's leading direct marketing experts, writes that on an average evening he receives five telemarketing calls. See James R. Rosenfield, "What Could Be More Successful Than Telemarketing?" 58 *Direct Marketing* 14, 14 (1996). Thirty to 40 telemarketing calls a week are simply too many. *Id.* at 15.

³² The volume of spam promises to become as overwhelming as the volume of telemarketing. Americans received nearly 4 billion pieces of spam in 1999 and more than 5 billion pieces in 2000; they are expected to receive approximately 7.5 billion pieces in 2003. See *eMarketer, The eMail Marketing Report: Executive Summary* (visited Feb. 10, 2002) <http://www.the-dma.org/cgi/registered/whitepapers/eMail_Market_Exec_Sum_SS.pdf>. The amount of spam an average consumer receives per week is also increasing. See *id.* For example, the average amount of spam consumers received per week rose from 9 in 1999 to 10 in 2000. See *id.* Forrester Research, Inc. predicts that by 2004 the average household will receive 9 pieces of marketing email per day. See Lori Enos, *Report: Email Taking Hold as E-Commerce Tool*, E-COMMERCE TIMES, Mar. 9, 2000, <<http://www.ecommercetimes.com/news/articles2000/000309-5.shtml>> (quoting Forrester senior analyst Jim Nail and citing a Forrester report unavailable to the public).

Available statistics also suggest that the aggregate volume of solicitations is increasing. Expenditures on direct marketing grew at an annual rate of approximately eight percent during the 1990s. The industry's workforce increased by more than five-and-a-half percent per year between 1995 and 2000. See Direct Marketing Association, *Economic Impact: U.S. Direct Marketing Today Executive Summary* (visited Feb. 10, 2002) <<http://www.the-dma.org/cgi/registered/research/libres-ecoimpact2.shtml>>.

an unsustainable position because the same legal regime that fails to account for the industry's negative externalities also creates a tragedy of the commons. Like ranchers on a shared pasture or fishermen on an unregulated lake, telemarketers (and other direct marketers) overconsume a scarce resource: the time and attention of American consumers. Because telemarketers bombard consumers with solicitations—often advertising products unrelated to the listener's interests—more and more consumers are determined to shut direct marketers out.³³ There are at least three manifestations of consumers' growing determination to avoid being subjected to unsolicited solicitations: (1) declining response rates;³⁴ (2) increasing popularity of products and services that block direct marketing; and (3) a tide of recent legislation aimed at curbing telemarketing and spam.³⁵ Together, these phenomena

³³ A number of experts have noted or implied a causal relationship between the growth in the volume of solicitations and consumers' increasing determination to shield themselves from direct marketers. One article quotes the following remark by Rudy Oetting: "There's more volume to a household. And the more volume, the more defense mechanisms people are putting up." Romano, *supra* note 26, at 2. James R. Rosenfield, a leading authority on direct marketing, writes that steep increases in call volume have been accompanied by "ever lower closure rates." Rosenfield, *supra* note 31, at 14. *Infra*, note 34, quotes the relevant portion of Rosenfield's article at greater length.

³⁴ Readers may wonder how the telemarketing industry has managed to grow dramatically while response rates were plummeting; the answer is that new technology dramatically reduced the cost to telemarketers of making a phone solicitation. Rosenfield, *supra* 31, at 14, writes:

To visit a modern telemarketing center is to be dazzled by information age technology. One of the remarkable things is that you never see a phone! Huge central computers, with predictive dialing systems, do the work. The telemarketer is liberated to concentrate on selling. It's a far cry from the pioneering days of the 1960s, when out-of-work actors dialed rotary phones in burned-out basements.

But alas, nothing falls [sic] like success, and we always go too far—it's the American way. If one call makes money, two will make more! And 2,000 even more! And if we can drive the costs down, down, down, we drive the numbers up, up, up, and live with ever lower closure rates. Which means that the quality of the outbound telemarketing experience, never sterling, has deteriorated over the last few years.

Tom Eisenhart, *Telemarketing Takes Quantum Leap*, ADVERTISING AGE'S BUS. MARKETING, Sep. 1993, at 75, 75-76, provides a more detailed account of the new technologies used by contemporary telemarketers.

³⁵ The First Amendment severely constrains the range of legal options for curbing direct mail. *See, e.g., Consolidated Edison Co. v. Public Service Commission Of New York*, 447 U.S. 530.

constitute a looming crisis for the direct marketing industry.

Assessing changes in the percentage of consumers who respond favorably to sales calls is tricky but not impossible. We are not aware of any situations in which telemarketers released response rates.³⁶ Even if data were available, it would be difficult to compare statistics from different sources because the term “response rate” is so ambiguous and it is hard to compare statistics across time because the wider adoption of measures such as don’t-call lists and unlisted phone numbers has the perverse effect of appearing to increase the percentage of consumers who are receptive to telemarketing calls. In light of these constraints, one option is to rely on anecdotal reports that response rates have decreased over time.³⁷ A better approach, however, is to document the precipitous decline in response rates to public opinion polls conducted by phone.³⁸ Unlike telemarketing firms, polling

³⁶ The authors contacted researchers, journalists and direct marketing firms in an effort to obtain telemarketing response rates.

³⁷ See, e.g., Rosenfield, *supra* note 31, at 14 (noting that telemarketing “closure rates” had decreased); Scott Hovanyetz, *Newsday Set to Outsource Teleservices*, DIRECT MARKETING NEWS, Apr. 26, 2001, available at <http://63.208.125.93/msgBoard/read.php?f=1&i=3529&t=3529> (quoting a spokesperson for Newsday, a daily paper with a circulation approaching 600,000, who observed, “We were finding [telemarketing] was becoming less and less successful.”).

³⁸ Consumers’ frustration with the large and growing number of sales calls they receive is not necessarily the only factor behind the drop in polling response rates. Charlotte G. Steeh, *Trends in Nonresponse Rates, 1952-1979*, 45 PUB. OPINION Q. 40, 40, 44-48 (1981), observes that demographic changes—in particular, rising levels of urbanization—account for part of the change. Another factor may be the rising prevalence of “false surveys”—instances in which telemarketers ask consumers to participate in an alleged poll or survey but subsequently make a sales pitch. See Stephen Schleifer, *Trends in Attitudes Toward and Participation in Survey Research*, 50 PUB. OPINION Q. 17, 20, 22 (1986) (observing that the percentage of consumers subjected to a false survey in a given year rose from 13% in 1980 to 17% in 1984). In addition, consumers could be responding to growth in the volume of phone surveys instead of or in addition to growth in the number of sales calls. See Don Van Natta, Jr., “Polling’s ‘Dirty Secret’: No Response,” THE N.Y. TIMES, Nov. 21, 1999, § 4, at 1 (“Thanks to the ever-rising number of opinion polls and telemarketing phone calls . . . more and more people simply refuse to be questioned.”). Finally, fans of Arianna Huffington—and other persons upset by the extent of politicians’ reliance on polls—may believe they are promoting the public interest when they refuse to participate in surveys. See *infra*, note 40 (discussing Ms. Huffington’s crusade against

organizations occasionally share their response rates with researchers and journalists.³⁹ In addition, there is less ambiguity about what constitutes a response to a survey. And quite apart from its value as a proxy, a decline in polling response rates will also be of interest because “a low response rate is one of the few outcomes or features that—taken by itself—is considered a major threat to the usefulness of a survey.”⁴⁰

Polling response rates appear to have declined dramatically over the past few decades.⁴¹ One leading authority observes that in their heyday phone surveys garnered response rates of 65% to

polling).

Nevertheless, the dramatic decrease in polling response rates is at least consistent with the tragedy of the commons hypothesis—the view that overconsumption of consumers’ time and attention renders them more determined to protect their solitude against unsolicited intrusions. *See also* Van Natta, *supra*, at 1 (quoting a pollster who attributes the growing number of refusals to the public’s weariness with aggressive telemarketers).

³⁹ Though more forthcoming than telemarketers, polling organizations are also close-mouthed about response rates. Van Natta, *supra* note 38, § 4, at 1, writes, “Far fewer people agree to participate in surveys than just 10 years ago, a fact that some critics call the industry’s ‘dirty little secret,’ because most polling firms refuse to divulge their surveys’ refusal rates.”

⁴⁰ Richard Curtin et al., *The Effects of Response Rate Changes on the Index of Consumer Sentiment*, 64 PUB. OPINION Q. 413, 413 (2000). But note that at least a small number of commentators believe that declining response rates to public opinion polls are desirable—precisely because they undermine the polls’ reliability. *See Partnership for a Poll-Free America: A Joint Project of Arianna Huffington and Harry Shearer*, (visited Feb. 10, 2002) <<http://www.ariannaonline.com/crusades/ppfa.html>> (arguing that public opinion polls have turned our political leaders into “spineless followers” and urging visitors to submit a written pledge to refuse to answer pollsters’ questions).

⁴¹ *See generally* Evans Witt, *People Who Count: Polling in a New Century*, PUB. PERSP., July-Aug. 2001, at 25, 26 (“As pollsters, we worry about declining response rates and technological advances that make it harder and harder to get respondents on the telephone.”).

Response rates for surveys conducted by mail have also declined. *See* Richard J. Fox et al., *Mail Survey Response Rate*, 52 PUB. OPINION Q. 467-491 (1988).

70%.⁴² Just ten years ago, response rates were typically at least 50%.⁴³ Today, pollsters report response rates as low as 15% or 20%.⁴⁴ One academic study shows that the percentage of respondents who refused to be interviewed increased sharply between 1952 and 1979.⁴⁵ One indication that low response rates have become a serious problem for researchers is the fact that speakers at the polling industry's premier gathering, the annual meeting of the American Association for Public Opinion Research (AAPOR), have devoted enormous attention to the topic. The 1999 AAPOR, for example, featured 6 panels and at least 17 presentations on the subject.⁴⁶

Response rates to direct mail and spam have also declined precipitously. Though statistics are not available for the entire direct mail industry,⁴⁷ marketing firm BAIGlobal Inc. has been tracking response rates to credit card mailings since the mid-1980s. Response rates hit a new low during each

⁴² See Rebecca Buckman, *Pollsters increasingly use the Net to conduct surveys; It may be easier, but is it science?* WALL ST. J., Oct. 23, 2000, R43, available at 2000 WL-WSJ 26614070 (reporting a statement by Gordon H. Black, chairman and CEO of polling firm Harris Interactive Inc.).

⁴³ See Van Natta, *supra* note 38, at 1.

⁴⁴ See *id.*; Buckman, *supra* note 42, at R43.

⁴⁵ Charlotte G. Steeh, *Trends in Nonresponse Rates, 1952-1979*, 45 PUB. OPINION Q. 40, 40, 44 fig.1 (1981) (showing that refusal rates for the National Election Studies grew from 6% in 1952 to 23% in 1979 and refusal rates for the Surveys of Consumer Attitudes increased from approximately 5% in 1953 to 16% in 1976). A more recent paper reports that response rates declined only slightly between 1979 and 1996, but "the effort to obtain that result . . . increased dramatically over time"; both the mean number of calls to complete an interview and the number of cases in which the poll-taker "converted" a respondent who initially refused to participate approximately doubled during the period of study. See Curtin et al., *supra* note 40, at 414.

⁴⁶ See Michael W. Link & Robert W. Oldenick, *Call Screening: Is It Really a Problem for Survey Research?*, 63 PUB. OPINION Q. 577, 577 & n.1 (1999).

⁴⁷ Pete Hisey, *Keeping what's yours on the 'Net*, CREDIT CARD MGMT., June 1, 2000, available at 2000 WL 10684253, writes that response rates to direct mail pieces have hit all-time lows. His principal source, however, appears to be the same BAIGlobal studies discussed in the body of this paper, rather than additional, systematic research on the entire direct mail industry. See generally Ross D. Petty, "Marketing Without Consent: Consumer Choice and Costs, Privacy, and Public Policy," 19 J. OF PUB. POL. & MARKETING 42, 47 (2000) (citing Headden, 1997 who states that half of all direct mail is disposed of without examination).

of the past four years. In 2000, the most recent year for which statistics are available, credit card companies mailed out a record-high number of solicitations (3.54 billion solicitations, up from 2.87 billion in 1999) and their response rate declined from 1.0% in 1999 to just 0.6%.⁴⁸ Gauging changes in email response rates—and ascertaining the causes of these changes—is difficult for three reasons. First, there are widely divergent views about what constitutes a “response.”⁴⁹ Second, during the early years of Internet advertising, there were few if any entities using rigorous methodologies to document its development. Third, unlike other direct marketing mediums, the Internet has experienced rapid demographic changes over the past several years. These constraints aside, industry participants generally agree that spam response rates have declined to just a fraction of one percent—and that most of these responses are hate mail, notices of undelivered email, and messages requesting removal from the mailing list.⁵⁰ A leading Internet research firm predicts that as the volume of spam continues to rise,

⁴⁸ See Calmetta Coleman, *Credit-Card Offers Get Record Low in Response Rate*, WALL ST. J., Mar. 19, 2001, at B10 (citing survey by BAIGlobal Inc.); *Press Release, Overall Credit Card Response Rate at Record Low for 1997*, BAIGlobal Inc., Mar. 1998, available at <http://www.baiglobal.com/Archives/PR0398.htm>. Coleman, *supra*, at B10, writes, “Andrew Davidson, president of the firm’s competitive tracking services, said consumers shrugged off so many offers last year [(2000)] largely because there were so many of them.”

⁴⁹ For an account of the different measures of consumer response, see Boldfish, *Ways to Measure Email Campaign Response Rates*, *Boldfish: Email Infrastructure for Your eBusiness*, (visited Feb. 11, 2002) <http://www.boldfish.com/BF_emguide/Notes/response.html>, describes the different standards for measuring consumer response to email advertisements. Possible measures include open (view) rate, click-through rate, conversion rate and acquisition rate. *Id.*

⁵⁰ See, e.g., Cyberkart Internet Marketing, *Spam vs. Opt-in*, (visited July 14, 2001) <<http://www.cyberkart.com/pages/insights.shtml>>; E-Target.com, *Opt-In Email Marketing* (visited July 13, 2001) <<http://e-target.com/advertiser.cfm?load=compare>>; Uri Raz, *Advertising on the Internet, or Why is Spam Bad?*, (visited July 14, 2001) <<http://www.united-marketinggroup.com/target.html>>; WSP Advertising Agency, *Bulk Email Advertising Service*, (visited Feb. 11, 2002) <<http://www.wspromotion.com/newsletter.html>>; see also Roberta Furger, *Email’s Second Shot*, UPSIDETODAY, (visited Feb. 11, 2002) <<http://www.upside.com/taxis/mvm/story?id=38c93c990>> (noting that a large-scale spammer’s response rate had fallen by nearly 38%); Dr. Tom Osborn, Director of Modelling, The NTF Group,

response rates will fall even further during coming years.⁵¹

The rising volume of unsolicited solicitations has also fueled the growing popularity of services that block direct marketing. Consumers' efforts to avoid telemarketers are especially well-documented. The states with "don't call" lists in operation for more than a few years have recently experienced explosive growth. Florida, for example, became one of the first states to create a don't-call list back in 1990. The number of consumers registered with the Florida list has increased by more than 370% during the last 5 years.⁵² States that created don't-call lists during the past couple years have also experienced enormous demand. Six months before the Tennessee don't call list became operational, the director of the Tennessee Regulatory Authority's Consumer Division reported that his agency was already "swamped" with an "onslaught of calls" from persons anxious to register for the list.⁵³ New York residents, meanwhile, registered well over one million phone numbers for the state's don't-call list during the six month interval *before* the list became operational.⁵⁴ Connecticut just

Decision Support Consultants, "RE: [MR] spamming <> sampling [Post to Some Discussion Group], Apr 11, 2001 (claiming that the spam response rate is "orders of magnitude" below 0.05%, the response rate for click-through advertising). *But see* Furger, *supra* (reporting that spam response rates ranged from 2% to 10%).

⁵¹ See Keith Regan, *Report: Email Marketing To Reach \$7.3B by 2005*, E-COMMERCE TIMES (May 9, 2000) <<http://www.ecommercetimes.com/perl/story/3265.html>> (recounting predictions by Michele Slack, senior analyst at Jupiter Communications, and summarizing a Jupiter research report unavailable to the public).

⁵² The number of people registered for the Florida don't-call list grew from 36,986 in 1996 to 136,913 in 2001. The generally low number of registrants is likely attributable to the lack of consumer awareness, *see infra* text accompanying note 96, and the high cost of registration; Florida residents pay \$10/number for their first year on the list and \$5/number for each additional year. Interview with Beth Evans, Regulatory Consultant, Florida Department of Agriculture and Consumer Services, July 8, 2001.

⁵³ David Flessner, *'Don't Call' Pleas Grow in Tennessee*, THE TIMES & FREE PRESS, Jan. 6, 2000, available at <http://www.timesfreepress.com/2000/JAN/06JAN00/NEWS3.html>.

⁵⁴ New York Governor George Pataki signed legislation creating the "Do Not Call" Registry in October 2000. The Registry became effective on April 1, 2001. *See* New York State Consumer

announced that during the first year in which its don't call list was operational more than 700,000 out of its 3.4 million residents opted out of the telemarketing pond.⁵⁵ The number of consumers registered with the don't-call list that the Direct Marketing Association distributes to its members has also increased.⁵⁶

At the same time, more Americans than ever before are paying for services that allow them to avoid phone solicitations.⁵⁷ Between 1981 and 1996, the percentage of American consumers with unlisted phone numbers more than doubled—rising from 13.9% to 30%.⁵⁸ Caller ID was not available

Protection Board, *New York State Consumer Guide to the "Do Not Call" Telemarketing Registry* (visited Feb. 11, 2002) <<https://www.nynocall.com/guide.html>>. During this period, consumers registered 1,160,467 phone numbers. Email from Bill Bennett, Vice President, New York Consumer Protection Board (June 30, 2001).

⁵⁵ The Connecticut population figure was taken from U.S. Census Bureau, *DP-1. Profile of General Demographic Characteristics: 2000, Geographic Area: Connecticut* (visited Feb. 14, 2002) <http://factfinder.census.gov/servlet/BasicFactsTable?_lang=en&_vt_name=DEC_2000_SF1_U_DP1&_geo_id=04000US09>.

⁵⁶ DIRECT MARKETING ASSOCIATION, *ECONOMIC IMPACT: U.S. DIRECT & INTERACTIVE MARKETING TODAY/2000 TELEPHONE MARKETING* (2001).

⁵⁷ Private Citizen Inc. provides another alternative for individuals determined to avoid direct marketing. The company reports that thousands of Americans have paid between \$10 and \$20 for services designed to reduce direct mail or phone solicitations. When consumers purchase Private Citizen's anti-telemarketing service, the company adds their names to a don't-call list that it mails at intervals to 1,500 telemarketers. If a telemarketer to whom this list has been mailed nevertheless calls a Private Citizen customer, that customer can sue the telemarketer for \$500 per call. For more information about Private Citizen Inc., see *Private Citizen*, (visited Feb. 11, 2002) <www.privatecitizen.com>.

⁵⁸ Compare FRANK NEWPORT ET AL., *WHERE AMERICA STANDS* (1997) with Roman, "Telephone: The Growing Medium," in *FACT BOOK ON DIRECT MARKETING* 133 (1985 ed.), cited in Nadel, *supra* note 13, at 100 & n.13.

in all fifty states until 1996,⁵⁹ but already 39% of Americans subscribe to the service.⁶⁰ BellSouth is one of three Baby Bells that recently introduced a proprietary service to block telemarketing calls; though the service, Privacy Director, costs \$5.95 per month plus a one-time fee of \$19.95 as well as long distance and operator charges for each call intercepted, BellSouth reports that 150,000 customers have already signed up in Atlanta and South Florida alone.⁶¹ The popularity of services such as Privacy Director and Caller ID, meanwhile, seems slight when juxtaposed against the ubiquity of anti-spam software. Every major email provider incorporates spam-blocking measures into its standard package. Indeed, companies such as Earthlink, America Online and Hotmail now seek to differentiate their services by advertising the particular technologies they have developed to fight spam. And this past winter, the “telezapper”—a device which admits a sound to induce autodialers to disconnect—was aggressively marketed as the perfect Christmas gift.⁶²

State legislatures have also become more active participants in the struggle to curb spam and

⁵⁹ California was the last state to implement Caller ID. It activated the service on June 1, 1996. See Utility Consumers' Action Network/ Privacy Rights Clearinghouse, *Fact Sheet 19: Caller ID and My Privacy* (last modified Aug. 2000) <<http://www.privacyrights.org/fs/fs19-cid.htm>>.

⁶⁰ See ATA Survey, *ATA Consumer Research – February/March 2001* (visited Feb. 11, 2002) <http://www.ataconnect.org/htdocs/consinfo/consumer_study_march-feb01.htm>. The American Teleservices Association sponsored two telephone surveys on February 16 through 18 and March 2 through 4, 2001 of 1,000 consumers about their use of telephones, the Internet, and related services. The research was conducted by Market Facts, Inc.

⁶¹ See Karin Schill Rives, *BellSouth Telemarketing Call-Block Service Rejected in North Carolina*, THE NEWS & OBSERVER, Aug. 4, 2000, available at 2000 WL 24910815.

⁶² At the time that this article was being written, Telezapper was available at MSN eShop (available at <http://eshop.msn.com/softcontent/softcontent.aspx?scpId=1936&scmId=922>), Amazon.com (available at <http://www.amazon.com/exec/obidos/ASIN/B00005TQ1Y/ref%3De%5Fde%5Facc%5F3%5F1%5F103-1951485-9875063>), and Yahoo Shopping (available at <http://shop.store.yahoo.com/phonesphonesphones/telteldet.html>). Telezapper's homepage can be found at <<http://www.telezapper.com/default.asp>>.

phone solicitations. In July 1997, Nevada became the first state to enact anti-spam legislation.⁶³ By November 1999, four states had passed statutes regulating the transmission of unsolicited commercial emails.⁶⁴ Today, at least eighteen states have enacted anti-spam laws.⁶⁵ These laws range from provisions banning deceitful practices such as “spoofing” or requiring mandatory labelling to laws banning spam outright.⁶⁶ The U.S. Congress is also considering a variety of anti-spam measures.⁶⁷ The

⁶³ See NEV. REV. STAT. §§ 41.705-.735 (2002).

⁶⁴ See Matthew S. Brown et al., *Spam Doesn't Come Only in Cans: A Summary of the Current Law Regarding Unsolicited Commercial Email*, 4 CYBER. LAW. 19, 21 (1999). Those four states are California, Nevada, Virginia and Washington. *Id.*

⁶⁵ David E. Sorkin, *Spam Laws: United States: State Laws: Summary*, ([visited Feb. 11, 2002](http://www.spamlaws.com/state/summary.html)) <<http://www.spamlaws.com/state/summary.html>> summarizes state anti-spam laws. But the summary is incomplete. For example, Professor Sorkin discusses Virginia legislation prohibiting “spoofing,” but omits mention of other Virginia legislation that bans spam outright and imposes criminal as well as civil penalties on spammers. (Spoofing means falsifying the origin or delivery route of an email.) For a description of the more stringent components of Virginia anti-spam law, see Reuters, *Virginia Passes Anti-Spam Law*, Feb. 24, 1999, available at <http://www.zdnet.com/zdnn/stories/news/0,4586,2215334,00.html>. The text of the law is available at <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=991&typ=bil&val=sb881>.

⁶⁶ There are five basic kinds of anti-spam provisions. Most states that have adopted anti-spam legislation have adopted more than one type of provision. First, at least 8 states (California, Colorado, Idaho, Iowa, Missouri, Nevada, Rhode Island and Tennessee) require spammers to include in unsolicited commercial emails instructions about how to opt-out of future emails and at least 7 states (all of the aforementioned states except Missouri) require individual spammers to honor opt-out requests. Second, at least 5 states require spammers to place a label (such as “ADV:”) in the subject heading of all or some types of unsolicited commercial emails. These states are California, Colorado, Nevada, Pennsylvania and Tennessee. Third, at least 13 states prohibit spoofing—falsifying the origin or delivery route of an email. These states are California, Connecticut, Delaware, Idaho, Illinois, Iowa, Louisiana, North Carolina, Oklahoma, Rhode Island, Virginia, Washington, and West Virginia. Fourth, at least 3 states (California, Louisiana and Tennessee) require that spammers comply with an Internet service provider’s (ISP) spam policy. Fifth, at least two states (Delaware and Virginia) prohibit spam outright. This survey of state anti-spam legislation was compiled principally from the resources available at www.spamlaws.com and secondarily using Reuters, *supra* note 65.

⁶⁷ Coalition Against Unsolicited Commercial Email, *Pending Legislation*, (last modified Apr. 26, 2001) <<http://www.cauce.org/legislation/index.shtml>>, summarizes anti-spam legislation introduced during past and current sessions of Congress. The House of Representatives passed an earlier version (H.R. 3113) of one pending bill (H.R. 95) during the 106th Congress; H.R. 3113 and H.R. 95 would require senders of unsolicited commercial email to comply with an ISP’s spam policy. *Id.*

spread of anti-telemarketing legislation has been slower but broader. A 1994 survey reports that at the time of publication six states had don't-call lists.⁶⁸ The most recent Direct Marketing Association white paper, by contrast, reports that 20 states currently have don't-call lists. Other kinds of telemarketing restrictions have also become more widespread since the early 1990s.

The recent behavior of legislators and consumers corroborates the tragedy of the commons hypothesis. Each kind of solicitation disturbs a consumer's solitude to some degree.⁶⁹ The frequency with which direct marketers invade consumers' physical privacy has left consumers weary of solicitations and resentful of the direct marketing industry.⁷⁰ In the none-too-distant future, spammers, telemarketers, direct mail specialists and door-to-door salesmen may all find themselves fishing the same empty lake.

⁶⁸ Rita Marie Cain, *Call Up Someone and Just Say 'Buy' – Telemarketing and the Regulatory Environment*, 31 Am. Bus. L.J. 641, 666-98 app. (1994). The six states that had created don't call lists were Arizona, Florida, Louisiana, New Jersey, Oregon, and Utah. *Id.*

⁶⁹ In a 1995 survey, for example, 56% of consumers reported that unsolicited sales calls were a serious violation of privacy. Telemarketing was more widely regarded as a serious violation of privacy than the imposition of polygraph, AIDS or drug tests by employers. *See And don't call back*, ADWEEK – W. EDITION, Nov. 13, 1995, at 22 (presenting results of a Yankelovich Monitor poll).

⁷⁰ Some consumers—and public officials—are more resentful than others. During a heated debate in the Texas State Legislature about a proposed don't-call list, Representative Burt Solomons exclaimed, "If it were up to me, we would shoot telemarketers." *State Legislator: Shoot the Telemarketers*, DM NEWS, April 18, 2001, *quoted at* Californians Against Telephone Solicitation, *Quotes from 2001*, (visited Feb. 12, 2002) <<http://www.stopjunkcalls.com/quote01.htm>>. The trial judge in *State v. Wagner*, 608 N.E.2d 852 (1992), expressed similar sentiments, remarking, "There are times when I just want to take a shotgun and, if I could shoot them through the phone, I'd do it." *Id.* at 856.

II. The Market Solution

The government can solve the tragedy of the commons and negative externalities problems by empowering consumers to set prices at which they are willing to receive different kinds of unsolicited solicitations. In essence, this approach creates a market for physical privacy.⁷¹ Currently, telemarketers start out with the entitlement to call residents. Residents can often take action to take back this entitlement (by paying for an unlisted number or in some jurisdictions by adding their names to a “don’t-call” list). But residents don’t have an effective means of selling their physical privacy to telemarketing firms. A resident’s right to avoid unsolicited solicitations is thus effectively what Susan Rose-Ackerman termed “market inalienable.”⁷² Residents can give away their privacy right (by failing to block such calls) or they can take steps to perfect their privacy rights, but they cannot sell their privacy right for money. The market inalienability of the consumer’s privacy right viz-a-viz business stands in great contrast to businesses’ privacy rights viz-a-viz consumers. For decades, businesses have used 1-900 numbers to force consumers to compensate the business for its time. Simply calling a 1-900 number triggers a per-minute payment from the consumer (easily collected through the consumer’s telephone bill) to the business. The simple proposal of this paper is to eliminate this asymmetry by allowing residents to freely alienate their rights to market privacy—that is, their right to

⁷¹ By referring to “physical privacy,” we adopt the terminology of Anita L. Allen. She explains:

The liberal conception of privacy is the idea that government ought to respect and protect interests in physical, informational, and proprietary privacy. By physical privacy, I mean spatial seclusion and solitude. By informational privacy, I mean confidentiality, secrecy, data protection, and control over personal information. By proprietary privacy, I mean control over names, likenesses, and repositories of personal identity.

Anita L. Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723, 723-24 (1999).

⁷² See Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931 (1985).

be left unsolicited.

Part III will discuss the details of our proposals and a variety of regulatory choices that government needs to confront to implement a market system—including difficult questions concerning the boundaries of participation and the degree to which consumers can refine their pricing choices. But for now we discuss the relative merits and failings of a market approach at a more theoretical level.

A market approach would force direct marketers to internalize the costs they impose on consumers. As a result, a consumer would only receive a solicitation when the expected benefit to herself and the direct marketer exceeded the expected cost.⁷³ While telemarketing would still be unsolicited in the micro sense, consumers would in a macro sense solicit calls by posting a price at which they would be happy to listen. We should emphasize that household members would not have a duty to listen to telemarketing calls—they could still hang up as soon as they saw fit. But our “name your own price” mechanism means that—in contrast to the current system—consumers would effectively *consent* to receive the call and hence express a willingness to listen to the beginning of the pitch.⁷⁴ Accordingly, under our system both the speaker and the listener reveal their preference to

⁷³ Our system would of course tolerate some inefficiencies. Viewed ex-post, the cost of some solicitations would exceed the benefit. The frequency with which particular solicitations would be ex-post efficient would depend on the level of nuance associated with consumers’ price-setting behavior—in other words, whether consumers set a single price for all sales calls or designated different prices depending on factors such as the identity of the caller, the type of product being sold and the time of the call. Ex-ante inefficiencies, meanwhile, would result from any of the following factors: (1) taxation of the payments consumers received from direct marketers; (2) strategic pricing; or (3) the fact that the particular market-based approach detailed in this paper does not empower ISPs to charge spammers for the cost of transmitting unsolicited email advertisements—though ISPs could continue to pass these costs along to consumers, who might in turn pass them along to spammers.

⁷⁴ There is a sense in which residents in states with “don’t call” statutes who decline to opt out can also be said to consent to receive telemarketing calls. But, as argued below, the majority of citizens in these states do not know that they have this option. And the quality of consent when residents are given an all or nothing choice is not as valuable as when residents are able to convexify their choices to

initiate the conversation—thus suggesting expected gains of trade.

Residents will benefit in three concrete ways. First, they will receive fewer telemarketing calls. Second, the calls they do receive are likely to be more interesting—because telemarketers facing additional costs of communication are likely to undertake additional efforts to restrict their sales efforts to the subset of consumers that are especially likely to be interested in purchasing that vendor's products. Consumers would have a simple means to adjust not only the volume of solicitations they received but also the frequency with which solicitations addressed their particular needs and interests. The more a consumer charges to listen to a phone solicitation (etc.), the more confident a prospective caller must be that the consumer will be receptive to his sales pitch. Finally, residents will receive a price that they individually deem to be adequate for the calls that they do receive.

In sum, our “name your own price” mechanism is likely to promote both social and consumer welfare. By revealed preference of speaker and listener, our mechanism tends to filter out communications where the social cost is greater than the social benefit—promoting social welfare. By giving consumers more choices than all-or-nothing alternatives, our mechanism presumptively increases their welfare.⁷⁵

Given that telemarketing is widely regarded as a pariah industry that exists in large part because of these uncompensated, externalized costs imposed on households, it is particularly unnecessary for either equitable or efficiency reasons to show that a move to our mechanism also benefits telemarketers.

take on intermediate values. Some of the residents who fail to opt out would prefer not to consent to some of the low value calls, and some of the residents who do opt out would be willing to consent to compensated telemarketing.

⁷⁵ This context has none of the rare attributes that might cause choice to be disabling. *See, e.g.,* Jennifer Gerarda Brown, *The “Sofie’s Choice” Paradox and the Discontinuous Self: Two Comments on Wertheimer*, 74 DENV. UNIV. L. R. 1255 (1997).

Indeed, our mechanism will not benefit many telemarketers who for the first time would be forced to compensate listeners for their time. Surprisingly, however, requiring telemarketers to compensate households can produce two different types of benefits for telemarketers themselves that mitigate the burden of compensation. And the telemarketers that make the most socially beneficial solicitations are likely to be the least harmed by the compensation requirement.

First, in at least one dimension, the “name your own price” mechanism increases the freedom of telemarketers by giving them the ability to compensate residents. As discussed above,⁷⁶ consumers are displaying increased resistance to telemarketing calls. The response rates to telephone surveys are in steep decline and consumers are much less likely to listen to, much less respond to telemarketing pitches. Our mechanism enhances telemarketers’ ability to generate willing listeners. As we will discuss below,⁷⁷ our system allows telemarketers at the beginning of the call to present a credible signal that the resident will be compensated for listening to the pitch. Household members hearing this signal may be much more willing to participate in the call.

The Gallup Organization and other polling firms might be willing to voluntarily offer compensation to residents (even if it were not required) in order to increase their response rates.⁷⁸ We might initially worry that the prospect of compensation would somehow bias the polling results. But

⁷⁶ See *supra* notes 37-39.

⁷⁷ See *infra* note 138 and accompanying text.

⁷⁸ Companies pay approximately two dollars for every minute that a randomly selected American spends answering a survey question. The company’s per-minute payment to an average survey respondent would likely be a small fraction of this current cost. By increasing response rates, our approach would decrease the number of man-hours necessary to complete a survey. So our approach would reduce labor costs and long-distance charges. Our approach might actually allow polling organizations to save money. And as we argue *infra*, text accompanying notes 83-84, it would improve polling accuracy

these concerns are misplaced. There is no reason to think that the answers of those who participated would be biased from what they would have been if they had not been compensated. The real concern is whether the polling organizations will ask a systematically non-random sample—avoiding the households that have named the highest prices. But this potential bias can be measured by comparing the average compensation paid in the survey to the average posted price in the population generally. Moreover, the bias under the current uncompensated system of having a 10 to 15% response rate is likely to be radically higher than the bias of having a compensated 70% response rate. The wild gyrations in the polls during the latest presidential election is largely attributable to the nose-dive in response rates. People are so intent on getting off the phone as soon as they sense that the call is unsolicited that they often don't try to distinguish a carpet cleaning pitch from political polling.

Compensated marketing is likely to help telemarketers to mitigate this resistance.⁷⁹

⁷⁹ There is a substantial literature exploring how incentives improve response rates. This literature indicates that monetary incentives, especially prepaid or other certain rewards that are enclosed in the survey itself, significantly improve response rates. *See, e.g.*, Raymond Hubbard & Eldon Little, "Cash Prizes and Mail Survey Response Rates," 16 J. OF THE ACAD. OF MARKETING SCI. 42-44 (1988); J. Scott Mizes et al., *Incentives for Increasing Return Rates*, 48 PUB. OPINION Q. 794-800 (1984), available at http://ehostvgw21.epnet.com/start_direct2.asp?key=204.179.122.141_8000_1311846283&site=direct&return=n&db=buh&jn=POQ&scope=site; Ruta J. Wilk, "Comments on the Feasibility of Using Monetary Incentives to Increase Response Rates to Social Surveys in the United States. Creation of Cognitive Inconsistency for Incentive Recipients; Interpretation of Varied Response to Questionnaires with Monetary Incentives," 29 SOC. WORK RESEARCH & ABSTRACTS 33, 33-34 (1993).

Researchers theorize that pre-payments improve response rates because failure to complete the survey would produce cognitive dissonance in the respondents—they would feel cheap about keeping the dollar without completing the task. If this theory is correct, then consumers are uncomfortable about receiving the money without performing the associated task. *See, e.g.* S. Oshikawa, *Consumer Pre-Decision Conflict and Post-Decision Dissonance*, 15 BEHAV. SCI. 132, 132-140 (1970); Wilk, *supra*, at 33-34.; This reasoning suggests that consumers who received payments in return for accepting telemarketing calls, spam or direct mail would actually give the unsolicited solicitations a good-faith read or listen.

For an example of how pollsters are using incentives and technology to compensate for

Second, telemarketers are benefited by the deregulation of the industry that naturally attends the movement toward compensation. Once a pricing mechanism empowers consumers to signal a willingness to receive telemarketing calls, it becomes unnecessary to impose stiff time and manner restrictions. Federal Communications Commission regulations authorized by the TCPA prohibit sales calls after 9 p.m. and before 8 a.m.⁸⁰ and outlaw the use of recorded telephone solicitations not preceded by a live communication.⁸¹ Many states amplify these time and manner restrictions by requiring telemarketers to share key information—such as the nature of the call, the products being sold, and these items’ prices—at the outset of the call,⁸² prohibiting autodialers and pre-recorded messages (altogether)⁸³ and or further limiting the times of day when telemarketers can call.⁸⁴ These restrictions make great sense under the current market-inalienable regime, in which consumers cannot effectively sell their right to be left alone. But time and manner restrictions are *prima facie* inefficient in a system in which consumers are given the option of separately pricing alternative times and manners. There is no reason to have a blanket prohibition against 2 a.m. telemarketing calls if consumers have the option of naming a price at which they would welcome these calls.

declining response rates, see Michael Lewis, *The Two-Bucks-a-Minute Democracy*, THE N.Y. TIMES MAG., Nov. 5, 2000, Sec. 6, p. 65. Lewis writes about Knowledge Networks, a start-up founded by two Stanford political scientists, that provides consumers willing to spend ten minutes per week answering surveys with a free Web TV, free Internet access and numerous prizes.

⁸⁰ See *supra* note 7.

⁸¹ See *supra* note 6.

⁸² See, e.g., ALA. CODE § 8-19A-12 (2001) (requiring telephone solicitors to identify themselves by name, the name of the company on whose behalf they are calling, and the nature of the good or service being offered within the first thirty seconds of the phone call).

⁸³ See, e.g., UTAH CODE ANN. § 13-25a-103 (2001) (prohibiting all use of automatic dialers except to dial numbers at which the recipient has consented to receive calls from autodialers or with whom the caller has a prior business relationship).

⁸⁴ See e.g., CONN. GEN. STAT. § 42-288a(c)(2) (prohibiting unsolicited sales calls between the hours of 9 p.m. and 9 a.m.).

While we don't predict that many consumers would opt to receive late night calls,⁸⁵ we do imagine a more vibrant market in pre-recorded calls. The current prohibitions against pre-recording all grow out of the concern with externalized costs. If the telemarketers are going to impose individualized costs on listeners, we want them to have to pay speakers by the hour. But this concern evaporates once the consumer is paid what she deems to be adequate compensation.

Notice there is no movement afoot to prohibit pre-recorded commercials on television or radio. The programming that surrounds the commercial is the compensation for listening to the pitch. Indeed, imagine how much worse commercials would be if pre-recording were prohibited. Madison Avenue has discovered economies of scale—in the form of taped commercials. Repeatedly reproducing a live commercial would be unnecessarily expensive. If telemarketers were able to similarly concentrate their efforts into pre-recorded messages with high production values, we could expect a better product than we often hear in the monotone renderings of minimum-wage script readers. The pre-recorded seatbelt warning by celebrities in New York City taxis are likely to be more entertaining than warnings by the cabbies themselves.

If telemarketers were given the freedom to use pre-recorded messages⁸⁶ delivered through autodialers, we imagine that the telephone might become a competitive outlet for polished advertisements (at least rivaling the radio). By targeting consumers with special interests, local grocery stores, movie theaters, book stores or music clubs could provide valuable information about sales or

⁸⁵ Some nocturnally-minded graduate students will probably find the federal regulation requiring telemarketers to call between 8 a.m. and 9 p.m. to be sub-optimal. Instead, they will prefer to set a low price for calls between 11 a.m. and 2 a.m. and a much higher price for calls at other times.

⁸⁶ Note that a market regime could allow consumers to set different prices for live and recorded pitches.

special offers. Indeed, the same spots that are produced for radio might be transmitted over the telephone at relatively low marginal cost. In Japan, a telemarketer voluntarily pays people to listen by providing free cell phone service to individuals who listen to advertisements before placing a call.⁸⁷

At the end of the day, some telemarketers might opt for compensation—especially if it were bundled with deregulation. Thus, while the “name your own price” regime does not constitute a strict pareto improvement for the entire telemarketing industry or even the subset of telemarketers with socially beneficial products, our mechanism represents a strong Kaldor-Hicks social improvement—one which benefits all consumers, benefits some telemarketers and falls short for other telemarketers in proportion to the social inefficiency of their activity. To our minds, this makes out a strong argument in both equity and efficiency for thinking that the proposal dominates the status quo.

⁸⁷ NPR cite.

A. Comparison With Improved Initial Disclosure

While we strongly prefer the market-based approach, mandating improved disclosure by direct marketers is likely to mitigate the worst costs of the current system—without introducing telemarketer payments. While both state and federal law require certain kinds of disclosure, the current rules are ineffective either because the disclosure format is non-uniform or because the duty to disclose is only triggered by a specific request for information from the resident. For example, the TCPA requires the telemarketer to give a whole host of information to households—including mailing the telemarketers’ procedures for complying with a “no more calls” request⁸⁸—but the duty to disclose this information is contingent on a specific request. Woefully few individuals know they have these rights, and much of the information is of little use. Some states have usefully amplified the disclosure obligations by requiring telemarketers *at the outset of the call* to share key information—such as the nature of the call, the products being sold, and these items’ prices.⁸⁹ But the format of this disclosure is not standard and again few consumers are aware of their state-law rights to information—so that enforcement and compliance are sorely lacking.

Instead, what is needed is quite simple. Statutes should require that telemarketing calls begin with a simple sentence: “This is an unsolicited telemarketing call.” Requiring a uniform disclosure at the beginning of the call would give consumers a much more efficient means of screening unwanted calls than exists today. The uniformity of the disclosure—like the uniformity of the *Miranda* warning—would quickly make consumers aware of the disclosure duty and put them on notice when a

⁸⁸ See 47 C.F.R. § 64.1200(e)(2)(i) (2002).

⁸⁹ See *supra* note 78.

telemarketer was in non-compliance. If consumers are given a bounty for reporting violations, non-compliance should become relatively rare.⁹⁰

Currently, direct marketers and their victims engage in an endless cat-and-mouse game in which the marketer tries to initially disguise with a variety of ruses the true nature of the call until they have the listener psychologically committed to listening. For example, who hasn't heard a call begin with feigned familiarity—"May I please speak with Joe . . .?"

The idea of requiring standardized disclosure at the beginning of a telemarketing call resonates deeply with long-standing practice concerning collect calls. Instead of hearing "Collect call from Jane Doe, do you want to accept the charges?", households in effect would be hearing "Telemarketing call from XXX, do you want to accept the inconvenience?"

Indeed, far from prohibiting pre-recorded telemarketing calls, the law should require that the disclosure be pre-recorded. Requiring a pre-recorded initial announcement would give the recipient information and the psychological freedom to disconnect before the substantive pitch begins. It is much easier to hang-up on a recording than a live human on the other end. The telemarketers ruthlessly exploit this deeply engrained norm of reciprocity to make listeners feel like schlemiels if they heartlessly cut-off a real person who is just trying to do her job. The federal law gets it just backward: it insists that pre-recorded messages be preceeded by a live message, when we should instead require that any live message be preceeded by a pre-recorded disclosure.

It would even be possible to frame the disclosure so as to allow even more passive types of

⁹⁰ This is especially true in states that allow unannounced recording of telephone conversations. Residents who have the potential of receiving, say, \$200 for reporting a non-complying call might have a sufficient incentive to automatically tape record all their calls—a la Nixon—and thus would have fairly conclusive evidence of non-compliance.

consumer filtering. Requiring the message to include a uniform set of tones would allow consumers to install a device that would automatically disconnect telemarketing calls. Or telemarketers could be required to call from pre-designated telephone numbers that would allow Caller ID devices to automatically block the call before it caused the resident's phone to ring.

Mandatory disclosure might also be a crucial complement to a voluntary market in telemarketing compensation. Imagine what might ensue if the mandatory disclosure added the second clause "and the telemarketer will credit your phone bill for xx cents for each minute you participate in this call." Under this voluntary system, the telemarketer would not be required to compensate the listener, but would need to disclose that no compensation was being offered ("zero cents"). We predict that this factual disclosure as to the purpose of the call and the offered compensation would cause some telemarketers to volunteer compensation—a possibility that we will return to below in Part III(B).

A requirement of straightforward, standardized, initial disclosure would also eliminate much of the current abuse of junk mail and spam. Imagine how much simpler it would be to sort your mail if unsolicited mass mailings had to include an encircled "J" in the lower-left hand corner (below the recipient's address). Instead of the current cat-and-mouse game, where junk mailers try to make their solicitations look like checks or tax documents or registered letters and recipients waste time trying to decode the true intent of the sender, the circled "J" requirement would allow any recipient to simply throw away the unwanted mail. Or think how devastatingly simple it would be to filter out spam if all such email had to include a uniform stream of characters—say "Unsolicited Commercial Email" or "UCE"—in the subject line.

Standardized, initial disclosure is superior to state and national don't-call lists and technological

filters (such as Caller ID.)⁹¹ But disclosure shares with these other measures the basic impulse to interdict (or to allow consumers to interdict) unwanted telemarketing calls. The next section probes whether our market-based approach dominates the variety of efforts at interdiction.

B. Comparison With Private and Public Interdiction

To persuade the reader that our system of alienable market privacy is worthwhile, it is useful to compare our proposal not just to the status quo but also to alternative reform proposals. Fortunately, all of the existing and proposed regulatory efforts to curb telemarketing abuse share a common goal of interdiction. These alternatives either would empower the consumer to prohibit certain classes of telemarketing calls or would themselves flatly prohibit entire classes of telemarketing (on that theory that no reasonable consumer would want to listen to them).

The second type of regulation includes the aforementioned outlawing of nighttime calls, of pre-recorded calls and of the use of autodialers.⁹² The first kind of regulation includes our own (standardized, initial) disclosure proposal as well as the more traditional filtering options of allowing unlisted numbers, Caller ID⁹³ and private opt-out services (such as Privacy Director) that make

⁹¹ While the state-enforced “don’t call” lists arguably provide a simpler, one-time mechanism for vetoing all telemarketing calls, the don’t-call lists, which have been around for in some states for up to 12 years, have had very low visibility. And the more cumbersome self-filtering facilitated by disclosure would quickly become known by all consumers (and like *Miranda* would likely become part of popular culture with references in movies and television).

⁹² See *supra* notes 79, 80.

⁹³ Caller ID is, at present, a fairly ineffective mechanism for screening out phone solicitations, because the devices are frequently unable to identify telemarketing calls as such. Autodialers use a special kind of phone line (an ISDN line) that allows telemarketers to control what your Caller ID box says. Unsurprisingly, they generally choose not to identify themselves in the Caller ID box as telemarketers. See Dennis Hawkins, *Tired of Hang Up Calls?* (visited Feb. 12, 2002)

consumers less accessible to telemarketers.⁹⁴ The nation's largest direct marketing trade association (the Direct Mail Association) itself has attempted to forestall federal regulation by requiring its members to at least notionally refrain from calling persons on its national opt-out list, the Telephone Preference Service (TPS).⁹⁵ The federal TCPA requires telemarketers to honor consumers' requests not to receive additional sales calls from a particular company. And twenty states have gone further in facilitating consumer interdiction by passing "don't-call" statutes that allow consumers to opt-out of all unsolicited commercial telemarketing calls in advance. These "don't-call" statutes combine the advantages of the TPS and the TCPA in that they have the force of law and they are truly unified ex-ante opt-out systems.

Professor Jeff Sovern takes another step toward effective interdiction by proposing that we flip

<<http://www.antitelemarketer.com/index2k1.htm>>.

⁹⁴ See *supra* notes 51-54 and accompanying text. For a list of strategies a consumer can use to diminish the number of telemarketing calls she receives, see Junkbusters.com, *Junkbuster's Guide to Reducing Junk* (visited Feb. 12, 2002)

<<http://www.junkbusters.com/ht/en/self.html#telemarketing>>. By scrolling up and down on that page, the reader can obtain comparable information about how to avoid spam and direct mail. See also Federal Communications Commission, *Consumer Facts: Unwanted Telephone Marketing Calls* (visited Feb. 12, 2002) <http://www.fcc.gov/ccb/consumer_news/unsolici.html>.

⁹⁵ See Direct Marketing Association, *Consumers: A Helpful Guide—How to Get Your Name Off Telemarketing Lists* (visited Feb. 12, 2002) <<http://www.the-dma.org/consumers/offtelephonenumberlist.html>>; Direct Marketing Association, *Privacy Promise Member Compliance Guide* (visited Feb. 12, 2002) <<http://www.the-dma.org/library/privacy/privacypromise.shtml>>. The DMA also operates a Mail Preference Service and an Email Preference Service. Direct Marketing Association, *Subscribe to the DMA's Mail Preference Service* (visited Feb. 12, 2002) <<http://www.the-dma.org/preference/mpssubscription.shtml>>; Direct Marketing Association, *Subscribe to the DMA's Email Preference Service* (visited Feb. 12, 2002) <<http://www.the-dma.org/preference/empssubscription.shtml>>. The Email Preference Service not only allows individual consumers to opt-out of solicitations from DMA members, but also allows web administrators to opt-out for an entire domain. See Direct Marketing Association, *The DMA's Email Preference Service*, (visited Feb. 12, 2002) <<http://www.e-mps.org/en>>.

the default of the current “don’t call” statutes. Instead of an opt-out system that allows telemarketing calls unless the household affirmatively opts out, Sovern suggests an opt-in system that would prohibit sales calls unless and until consumers affirmatively signaled that they wanted to receive them. Sovern persuasively argues that an opt-in default would mitigate the problem of low consumer awareness about the don’t-call option. The opt-out rules give telemarketers no incentive to educate consumers about their legal options. In contrast, the opt-in rules, like other penalty defaults, place the onus on the better-informed party and hence can have an information-forcing effect.⁹⁶

These alternatives—whether they be private attempts to perfect consumer filtering (via unlisted numbers or the TPS), public attempts to perfect consumer filter (via the TCPA or don’t call statutes), or public attempts to interdict on behalf of consumers (as with the prohibition on nighttime and pre-recorded calls) – all share two basic flaws relative to our proposal. These alternatives are both under- and over-inclusive.

These policies are under-inclusive relative to our market approach. Consumers relying on the TPS, the TCPA and/or telephone company services such as Caller ID will still be subjected to unwanted intrusions. Some telemarketing companies are not bound by DMA regulations because they are not members of the organization. Moreover, a substantial proportion of the organization’s membership violates its privacy guidelines⁹⁷ and the DMA appears to be making little effort to improve

⁹⁶ See Ian Ayres & Robert Gertner, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules*, 99 YALE L. J. 87 (1992).

⁹⁷ See PAUL M. SCHWARTZ & JOEL R. REIDENBERG, DATA PRIVACY LAW 217 (1996). According to *id.* at 333 (citing Mary J. Culnan, Consumer Attitudes Toward Secondary Information Use, Privacy and Name Removal: Implications for Direct Marketing, Paper Presented at Chicago/Mid-West Direct Marketing Days (Jan. 20, 1993), approximately one-half of DMA members do not use the Mail Preference Service.

compliance.⁹⁸ The TCPA, meanwhile, adopts a “one bite” rule that allows each telemarketing firm to call a consumer at least once.⁹⁹ And even in combination, Caller ID and an unlisted number will not stop a telemarketer that purchased its calling list from a bank, health plan or utility—or any other source apart from a phonebook—from cutting short a consumer’s nap.

Moreover, these “all or nothing” policies are underinclusive relative to our proposal, because some consumers may rationally prefer “all” to “nothing,” but would be still better off with “sometimes.” A resident who wants to facilitate communication with her friends may opt for a listed number—knowing that in doing so she will expose herself to many unwanted telemarketing calls—when she would have preferred to facilitate non-commercial calls and literally to tax the commercial ones.¹⁰⁰ Or a resident may rationally prefer to remain off a “don’t call” list because she values a few informative solicitations, when she would prefer even more to filter the less attractive of these calls with a pricing mechanism.

⁹⁸ See *id.* at 217, 338-39.

⁹⁹ See Junkbusters.com, U.S. Laws on Telemarketing, (visited Feb. 12, 2002) <<http://www.junkbusters.com/ht/en/fcc.html>> for the full list of TCPA regulations. A consumer successfully sued AT&T under the TCPA for continuing to make telemarketing calls after he asked them to stop. N.A.M.E.D. News Service, *AT&T Loses Suit over Telemarketing Calls*, August 13, 1999, available at <http://www.stopjunkcalls.com/at&t.htm>.

¹⁰⁰ The private precaution whereby consumers “unlist” their number also leads to inefficient over- and under-inclusion (as well as the out-of-pocket service fee) along other dimensions. Unlisted numbers are over-inclusive because they block communications that the resident would have wanted—including non-commercial communications. Unlisted numbers make the resident less accessible not only to telemarketers but to college friends as well. In short, persons who “unlist” often opt out of too many communications relative to our market approach. And unlisted numbers are under-inclusive because they are often imperfect filters. While some telemarketers compile their call lists from telephone books (and hence do not have access to unlisted numbers) others purchase their list from banks or other retailers who have access to consumers’ numbers (even if unlisted) as a precondition of doing business. See Antitelemarketer.com, *Methods of Antitelemarketing* (visited Feb. 13, 2002) <<http://www.antitelemarketer.com/index2k1.htm>>.

These various interdiction policies are also over-inclusive relative to our market approach. Many people who currently opt for “nothing” instead of “all” would be better off if they had the opportunity to say “sometimes.” None of these interdiction approaches comes close to facilitating the maximum number of efficient transactions.

This problem is especially serious for the various opt-in and opt-out approaches. These approaches essentially provide that the only consumers who should receive sales calls are those that derive positive utility from the average phone solicitation. But as with Gresham’s law of money, bad telemarketing calls tend to drive good calls out of circulation. While consumers may value the informational content of some telemarketing calls, the relentless abuse of the bad calls makes it rational for many households to say good riddance to all calls. Moreover, as we discussed at length in Part I, the inconvenience to a consumer from listening to certain telemarketing calls may be outweighed by the benefit to the telemarketer. The opt-in and opt-out approaches would block these transactions—even though, by assumption, everyone would be better off if telemarketer could compensate the consumer for her inconvenience.

“Don’t-call” lists are therefore over-inclusive both because they filter calls that the household would not find inconvenient and because they filter calls that are inconvenient but are nonetheless socially beneficial. The net impact of such over-filtering is detrimental not only to consumers but also to telemarketing firms and their employees. The DMA claims that the direct marketing industry employs more than 14.7 million people.¹⁰¹

¹⁰¹ See Direct Marketing Association, *1999 Economic Impact: U.S. Direct Marketing Today Executive Summary* (visited Feb. 13, 2002) <http://www.the-dma.org/cgi/registered/research/charts/dmemploy_med_market.shtml>. However, there is reason to believe that the DMA overestimates the number of people who work in direct marketing. Californians

Our approach affords consumers both of the options available under the opt-in and opt-out schemes, plus a range of intermediate choices that make it possible to conduct most of the efficient transactions that would be obstructed by these schemes. A consumer can replicate the current default rule by setting her price at zero. She can block all future solicitations by setting an arbitrarily high price—e.g. \$5,000 per sales call—or literally declining all calls. But she can also choose a more modest price that nevertheless allows telemarketers to compensate her for the bother associated with an unsolicited solicitation.

Finally, there is a real risk that these problems of over- and under-inclusion will intensify over time. The dynamic problem is that as consumers increasingly use the variety of public and private tools to make themselves unavailable to telemarketers, the industry will have perverse incentives to focus their harassing attention on the few people who fail to opt out. As with other types of visible victim precaution, opting out can impose costs on those who fail to take the precaution.¹⁰² Just as insurance

Against Telephone Solicitation, *The Great Telemarketing Lie* (visited Feb. 13, 2002). <<http://www.stopjunkcalls.com/lie.htm>>, describes one of the reasons why estimates of the number of people who work in telemarketing are so varied and potentially misleading. Within the telemarketing industry, telemarketing refers to both “inbound” telemarketers, i.e. people answering phones at customer call centers, and “outbound” telemarketers, i.e. people placing calls to consumers and businesses for advertising purposes. Since our proposal, as with most telemarketing legislation, would affect only “outbound” telemarketers, it would impact only a percentage of what the DMA regards as the telemarketing workforce. While requiring telemarketers to pay compensation may also dampen employment, the impact is likely not be as great as an equilibrium where a large proportion of the potential audience opts for “don’t call” status. The impact on employment may also be dampened by the current profits that are available to devote toward consumer compensation under our proposed system. According to Catherine Romano, *Telemarketing Grows Up*, MGMT. REV., June 1998, at 31, every dollar spent on outbound telephone marketing in 1997 resulted in an estimated \$7.31 return on investment. Cf. Cox, *supra* note 13, at 423 (noting that most telemarketing calls are from mainstream profitable business that do not need telemarketing to survive).

¹⁰² See Oren Bar-Gill & Alon Harel, *Crime Rates and Expected Sanctions: The Economics of Deterrence Revisited*, 30 J. LEGAL STUD. 485 (2001); Ian Ayres & Steven D. Levitt, [*Measuring the Positive Externalities from Unobservable Victim Precaution: An Empirical Analysis of*](#)

markets can unravel as successive rounds of insureds opt out of the insurance pool, telemarketing pools can inefficiently unravel as successive rounds of consumers register for state “don’t call” lists or de-list their phone numbers. Perversely, opting out of the telemarketing pool can be seen as a kind of “adverse selection.” Some of the people who opt out in later rounds only do so because their fellow citizens opted out early, and those who fail to opt out due to ignorance or inertia are left alone to bear the concentrated attention of the telemarketing industry.

This dynamic problem is likely to be muted under our market approach for two reasons. First, consumers who post intermediate prices are still quasi-available to the telemarketing industry (albeit for a price) and hence will dilute the industry’s focus on the consumers who fail to choose an intermediate price. Second, as we will discuss more fully below, the carrot of potential compensation is more likely to overcome the problems of ignorance and inertia than the uncommodified framework that currently confronts consumers in states with “don’t call” statutes.¹⁰³

In sum, our marketizing proposal is not only better than the laissez faire system that existed for many years, it is better than the various forms of public and private interdiction and interdictive choice that have been proposed and partially implemented at the state and federal levels. However, before detailing how such a system would function, we first consider theoretical criticisms of our basic marketizing approach. Recent works by Cass Sunstein, Margaret Jane Radin and Anita Allen each

[Lojack](#), 113 *QUARTERLY J. OF ECON.* 43 (1998).

¹⁰³ Default choice will have an important effect on the size of this dynamic problem under either a commodified or a non-commodified system. For example, Professor Sovern’s opt-in default is much more likely to depress the dynamic problem as ignorant and inert consumers will, by default, opt out of the system. *See* Sovern, *supra* note 13. As a pragmatic matter, we predict that virtually 100% of consumers in equilibrium would be inaccessible to telemarketers under Professor Sovern’s proposal—because who would want to be the only consumer (or one of very few consumers) to be subject to telemarketers’ entreaties?

suggest a possible grounds for repudiating our markets in privacy. Sunstein's critique emanates from the viewpoint that too much privacy is dangerous to republican government. Radin's and Allen's criticisms, by contrast, reflect fears that too little privacy is detrimental not merely to democracy but also to personhood. All three scholars nevertheless share an underlying concern about the continued spread of literal and metaphorical markets.

C. Theoretical Critiques of Privacy Markets

1. Sunstein's Concern With Excessive Filtering

Cass Sunstein's argument in *Republic.com* about the undesirable consequences of information filtering suggests an important challenge to our proposal. He argues that technologies that enable consumers to filter with increasing precision the content on the Web, television and radio and in newspapers and magazines will produce social polarization and fragmentation.¹⁰⁴ Polarization would occur if large numbers of individuals used these technologies to exclude content featuring viewpoints inconsistent with their own and discussing subjects in which they did not have a prior interest. Because they would interact almost exclusively with like-minded people, such individuals would develop more extreme versions of their existing viewpoints and would focus on existing hobbies to the exclusion of new interests. This phenomenon would make it harder for people on opposite sides of an issue to relate—because there would be a larger gulf between them and because they would have less in common in other facets of their lives.¹⁰⁵

Though Sunstein does not discuss how his thesis applies to direct marketing, one can extrapolate a likely answer. Sunstein is concerned that in the future, people will not voluntarily access (or “pull”) certain kinds of vital information. He would prefer that individuals be exposed to at least some of this information whether or not they would so choose in their capacity as consumers.¹⁰⁶ One imagines therefore that Sunstein would prefer a situation in which speakers can “push” this information

¹⁰⁴ CASS SUNSTEIN, *REPUBLIC.COM* 8-9, 16, 51-80 (2000).

¹⁰⁵ *See id.* at 51-80, 91-99.

¹⁰⁶ *See, e.g., id.* at 167.

at consumers to one in which consumers are not exposed to it at all. Indeed, he might argue that the more selective consumers become about what they pull, the more the state should seek to protect speakers' ability to "push" information using spam and other direct marketing techniques.

One facet of Sunstein's argument that underscores his sympathy for parties that push speech at members of the public is his affection for traditional public forums such as parks and street corners. Sunstein celebrates the fact that the public forum doctrine allows speakers in parks and on corners to subject members of the public to orations about whatever the speakers please.¹⁰⁷ Needless to say, soapboxes are the most primitive "push technology."

Another dimension of Sunstein's philosophy that suggests he would be critical of our plan to commodify direct marketers' access to individuals is his approach to First Amendment jurisprudence. Sunstein writes that there are two camps of First Amendment scholars: persons concerned with perfectly satisfying consumers' demands for customized menus of information goods and persons concerned with preserving a healthy republic populated by public-spirited and well-informed citizens.¹⁰⁸ Our proposal has an unabashed consumer orientation. In particular, our observation that government could empower consumers to infinitely differentiate the prices they charged depending on time, subject matter and other factors calls to mind the very system that Sunstein himself rejects.¹⁰⁹ He vividly envisions a world where filtering and pull technologies become so diabolical that instead of purchasing

¹⁰⁷ See e.g., *id.* at 12, 15.

¹⁰⁸ See *id.* at 141-166.

¹⁰⁹ Sunstein describes a hypothetical future in which consumers can filter information using an essentially endless range of criteria. See *id.* at 3-5. He first identifies the dystopic elements of this vision at *id.*, 8-10.

USA Today, consumers persistently opt for a radically solipsistic *Me Today*.¹¹⁰

While we share some of Sunstein's concerns about the "brave new world" of perfected consumer filtering, at the end of the day we think that allowing consumers to reclaim control of their market privacy—that is, their right to be free from unwanted commercial solicitations—actually complements Sunstein's project of maintaining citizens' openness to non-commercial solicitations. Sunstein himself repeatedly acknowledges that some filtering is necessary to prevent information overload.¹¹¹ As someone who believes that communications policy should emphasize people's role as citizens rather than as consumers,¹¹² Sunstein regards ordinary direct marketing solicitations as lower priority speech. He might therefore endorse a regime that allows consumers to restrict telemarketing solicitations, so that people would have more time and attention to devote to higher priority communications. The need to allow consumer filtering with regard to telemarketing and spam emails is particularly acute because these methods of communication entail very small marginal costs (of push) and hence are not self-limiting in the ways that the soapbox is.

Moreover, as detailed below, our core proposal only allows consumers to price overtly commercial solicitations—and would exclude mass, unsolicited communications from political or charitable non-profits. Consumers would still charge advertisers for a relatively small number of

¹¹⁰ Sunstein creates the impression that a legal thinker's views about the primacy of an individual's role as consumer or his role as citizen is consistent for all First Amendment issues—implying, in effect, that for First Amendment purposes, one is *either* a consumer advocate or a republican. *See, e.g., id.* 46-48 (portraying a dichotomy between the visions of the First Amendment championed by Justices Holmes and Brandeis). We regard as coherent the view that different roles should have primacy for different First Amendment issues. Regulations targeted chiefly at direct marketing, for example, might invite a scholar to treat individuals primarily as consumers, whereas a law aimed at stump speeches could impel the same person to consider individuals as citizens.

¹¹¹ *See id.* at 56-57.

¹¹² *See id.* at 22, 105.

solicitations that provide important social benefits, such as calls from vendors of a left-wing magazine to current subscribers of a right-wing periodical. But the system would not apply to higher priority communications.¹¹³

Finally, telemarketing solicitations differ from the exchanges that Sunstein regards as paradigmatic manifestations of the social function of speech since they occur in private spaces. As Sunstein repeatedly indicates, the inspiration for his analysis of the social functions of speech is the exchanges that take place in traditional public forums such as parks and street corners.¹¹⁴ He extols these forums because they give rise to “[u]nplanned and unchosen encounters.”¹¹⁵ But one of the cherished features of domestic life is the fact that individuals can avoid unwanted encounters. Preserving a private sanctuary where citizens have the right to be free from entreaties may actually make them more receptive when they venture out from their homes. Privacy is a low priority in public spaces and an exceedingly high priority in homes. Sunstein himself might therefore view the trade-offs associated with involuntarily intrusions as acceptable in the one context but unacceptable in the other.

One might respond by observing that although public parks and street corners are the inspiration for Sunstein’s theory, he also lauds general interest publications and television networks for

¹¹³ It should also be noted that our core proposal does not permit content discrimination within the commercial sphere—so that while consumers could charge different prices for time (night vs. day) or manner (pre-recorded vs. live), they could not charge different prices contingent on subject matter of the solicitation. This would make consumers more accessible to pitches about different types of products. Consumers would, however, retain their current “one bite” right under the TCPA to prohibit particular telemarketers from calling them again.

¹¹⁴ See, e.g., *id.* at 12, 15, 28, 196, 201. See also Carl S. Kaplan, “Law Professor Sees Hazard in Personalized News,” *NYTIMES.COM*, April 13, 2001 (reporting Professor Sunstein’s observation that Republic.com is in part an ode to city living).

¹¹⁵ SUNSTEIN, *supra* note 104, at 34.

accomplishing the same social functions.¹¹⁶ Since people read *Newsweek* and watch CBS in their homes, one might conclude that Sunstein's reservations about media filters imply a comparable lack of enthusiasm for technologies that filter direct marketing solicitations. Though compelling, this response ignores a basic difference between the media and direct marketing. A person who opens *Newsweek* has chosen to turn his attention to outside events. The reader might not have planned to come across a piece about Ethiopia, but he did expect to read and learn about something happening elsewhere in the world. The same cannot be said about direct marketing solicitations. People receive telemarketing calls during their most intimate and introspective moments. Under these circumstances, an "[u]nplanned and unchosen encounter" is especially objectionable.¹¹⁷

There is the risk that consumers who are compensated for commercial solicitations will become less receptive to uncompensated commercial solicitations. Residents will have more time to take non-profit solicitations, but will more acutely feel the opportunity cost of speaking to a campaign worker instead of a carpet cleaner. But we are encouraged by the fact that most people used to participate in

¹¹⁶ See *id.* at 12, 34-37. Sunstein observes that general interest publications and television broadcasters "can be understood as public forums of an especially important sort." *Id.* at 34.

¹¹⁷ Since Sunstein devotes considerable attention to the Internet, it is worth noting that the above distinction between media and direct marketing is replicated online—unplanned encounters are more intrusive when they take the form of spam than when they occur in new media because email is an especially private form of online activity. Chat rooms replicate off-line social settings in which strangers meet and become acquainted. Unplanned encounters are *de rigueur* in these contexts. New media publications such as *Salon* and *Slate* are similar to off-line magazines. Web surfers who visit these sites have chosen to listen to speakers they do not know personally talk about unfamiliar places and events. But email is analogous to conversation and correspondence—paradigmatically private activities that demand freedom from intrusions. If media organizations begin distributing personalized newspapers by email, then it might be appropriate to mandate the inclusion of some content unrelated to a particular consumer's preferences in these publications. Consumers who saw this content would at least have chosen to peruse a newspaper. Under the status quo, by contrast, consumers come across freestanding email advertisements while reading personal missives.

Gallop polls before over-fishing of telemarketers became such a problem. Recent empiricism suggests that citizens who see their altruistic acts as having a market value may become more charitable.¹¹⁸

While this issue is not free from doubt, our exemption of non-commercial speech from consumer pricing goes a very long way toward blunting Sunstein's core concern.

¹¹⁸ For example, Strahilevitz found that when the city of San Diego began selling individuals rights to use high occupancy vehicle lanes on the highway, the willingness of others to car pool increased. See Lior Jacob Strahilevitz, *How Changes in Property Regimes Influence Social Norms: Commodifying California's Carpool Lanes*, 75 IND. L. J. 1231 (2000).

2. Radin's Concern with Commodification

In *Contested Commodities*, Margaret Jane Radin argues that societies should not tolerate markets in certain kinds of goods and services. She distinguishes between fungible property, which is interchangeable with like items and money, and personal property, which is not.¹¹⁹ Radin contends, “Since personal property is connected with the self, morally justifiably, in a constitutive way, to disconnect it from the person (from the self) harms or destroys the self.”¹²⁰ It would be undesirable to commodify the right to be left alone by direct marketers if this right were a type of personal property.¹²¹

¹¹⁹ Radin introduced the distinction between fungible property and personal property in MARGARET RADIN, *Property and Personhood*, in REINTERPRETING PROPERTY 37 (1993).

¹²⁰ *See id.*

¹²¹ This paragraph sets out what we perceive to be Radin's core argument against commodification. She also offers a variety of other arguments: the domino theory; the likelihood that commodification will engender other forms of objectification such as subordination; the negative consequences of market rhetoric; etc. Thoroughly describing and analyzing each of these arguments would be an extremely lengthy project. There are, moreover, substantive reasons to deal with them briefly if at all. We ignore the domino theory because the author herself ultimately rejects it. *See* RADIN, *CONTESTED COMMODITIES*, *supra* note 121, at 101, 103-04. We do not address the relationship between commodification, objectification and subordination because it has little if any application to our theory. Radin writes that “wrongful subordination means unjustified dominance or exercise of power by one person or group over another.” *Id.* A market approach to the externalities engendered by direct marketing seems unlikely to cause “unjustified dominance . . . by one person or group.” *Id.* At most, one could argue that because wealthier consumers would probably earn more on average than poorer consumers, our system would produce maldistribution of wealth—and maldistribution of wealth enables the rich to dominate the poor. But Radin herself is ambivalent about the link between maldistribution of wealth and wrongful subordination. *See id.* at 158. Furthermore, although the rich might earn more than the poor in absolute terms, there is good reason to believe that the incomes of poor consumers would increase by a greater percentage than the incomes of wealthier consumers. This phenomenon is especially likely to occur since the amount that telemarketers offer to pay will depend largely upon factors—such as the frequency with which a person has made purchases over the phone—that correlate weakly if at all with income.

The application of market rhetoric to our proposal seems comparably strained. Discourse matters, Radin believes, for three reasons. *Id.* at 84. First, imperfect practitioners may perform inaccurate cost-benefit analyses because they overlook costs that are not readily monetizable. *Id.* at 85. But we are hard-pressed to identify a hidden cost to consumers from telemarketing. (Perhaps the

The right to be left alone by telemarketers is not usually a species of personal property because most Americans lack the right to prevent such intrusions. Radin states that commodification is undesirable when it facilitates the alienation of property that *has become* bound up with the self.¹²² But property cannot become bound up with the self unless the person has actually possessed or enjoyed it for a period of time. As we explain at greater length in Part III, the basic default rule in the United States is that telemarketers can solicit consumers.¹²³ Most states, moreover, do not afford consumers the right to opt-out of all future telephone solicitations. Since the large majority of Americans have never enjoyed a property interest in the relevant dimension of physical privacy, it cannot have become

person that chooses a household's rate will consider only the cost to herself and ignore the fact that the same call can irritate multiple family members?) Second, the use of rhetoric is sometimes insulting or injurious to personhood. Here, Radin is gesturing at ideas such as Richard Posner's conception of rape in terms of a marriage and sex market. *Id.* at 86-88. Third, radically different normative discourses may not be capable of reaching the same result—because they describe and interpret facts so differently. *See id.*, at 88-91; *see also id.*, at 133 (“[E]xperience is discourse dependent.”) We can imagine how the existence of a market could change people's interpretations. A consumer who signs up for a state's don't call list presumably feels gratified by the absence of telemarketing calls—he has warded off an unwelcome intrusion. By contrast, a consumer who charged telemarketers a moderate price might regard a lack of calls as a blow to his self-worth—as an indication that businesses did not value access to him. In his more poetic moments, this latter consumer might conceive of himself as a merchant with an empty storefront. But though possible, we are skeptical that this phenomenon will be widespread. Very few persons, we believe, will reflect more deeply than necessary to gauge the rate that will maximize their earning power. When they do reflect, we think people will be more likely to view themselves as prospective buyers being compensated for an intrusion than merchants selling access to their homes. And the fact that different households set different rates—and telemarketers' interest depends upon factors such as the frequency with which a particular consumer buys by phone—will discourage judgments that telemarketers view one consumer as more prosperous or worthwhile than another.

¹²² *See, e.g., id.* at 58.

¹²³ Technically, residents have a market inalienable right to be left alone between the hours of 9 p.m. and 8 a.m. and the right upon request not to be called back by individual telemarketers. *See supra* note 7.

bound up with their personhood and thus cannot be personal property.¹²⁴

The status quo aside, it is unclear that the right to be left alone by telemarketers could ever constitute personal property. Radin draws upon a variety of theories to develop a catalogue of items connected with personhood.¹²⁵ There is only one such item related to physical privacy: “Separateness: ‘Being able to live one’s own life and nobody else’s; being able to live one’s own life in one’s very own surroundings and context.’”¹²⁶ There are three reasons to doubt whether we should characterize the right to avoid direct marketing as personal property on the grounds that it promotes separateness. First, Radin herself is skeptical about whether this item is connected with personhood.¹²⁷ Second, she is ambiguous about whether “liv[ing] . . . in one’s very own surroundings and context” implies living in an environment that resonates with one’s individuality or obtaining physical seclusion—or both or neither.¹²⁸ To the extent it means the former, then our proposal seems to enhance separateness by

¹²⁴ Radin’s philosophical outlook suggests that she would be receptive to an argument premised on the American status quo. Radin describes herself as a “pragmatist” with a preference for “sticking fairly close to the details of context and not engaging in a search for a grand theory.” *Id.*, at xii, 63.

¹²⁵ In particular, she relies upon “[t]raditional ideal theory,” Kantian philosophy, and Martha Nussbaum’s “thick, vague theory of the good.” Traditional ideal theory about personhood, she notes, focuses on freedom and identity. *See id.*, at 55. Kantian doctrine can be read to suggest a “dialectic of contextuality” demanding both stability and flexibility in one’s environment. *See id.* at 56-63. And Nussbaum’s theory—itself an interpretation of Aristotle—identifies ten items necessary for human flourishing. Separateness, described above, is one such item. The others are capabilities associated with mortality, the body, pleasure and pain, cognitive capability, practical reason, early infant development, affiliation, relatedness to other species and to nature and humor and play. *See id.* at 63-72.

¹²⁶ *Id.* at 68.

¹²⁷ She observes, “[S]eparateness of physical bodies need not be related to separateness of selves, and where it is not, it may be disputed that separateness belongs on this list at all.” *Id.* at 70.

¹²⁸ Radin writes that the requirement of separateness “refers not to separation of the person from her environment, but rather to separation of one person from another person, with the premise being that for that kind of separation to be instantiated in the world, a certain kind of specific connection to one’s environment may be needed.” *Id.*, at 76. The author’s focus on “separation of one person from

allowing an individual to exert control over an element of his or her space. Third, even supposing that separateness referred solely to the dimension of physical privacy implicated by our proposal, it seems questionable whether the commodification of direct marketing would disturb individuals' seclusion to such a degree that their context and surroundings would no longer be their own. Radin draws part of her list of items connected with personhood from Martha Nussbaum's account of the requirements for human flourishing. Separateness is one such requirement. Other requirements include "[b]eing able . . . to have pleasurable experiences," "[b]eing able . . . to enjoy recreational activities," and "[b]eing able . . . to move from place to place." Nussbaum does not believe that people need infinite amounts of pleasure, recreation and mobility to flourish as human beings—just as Radin does not recommend that society prohibit markets in anything related to transportation, recreation or pleasure.¹²⁹ Instead, Nussbaum reasons that people need at least some finite amount of pleasure (and other goods). Radin, therefore, presumably believes that society should only prohibit the commodification of things the sale of which would plunge us below the threshold amount of some good. Since separateness (and possibly physical privacy) is one such good (or requirement for human flourishing), it makes sense to treat it in an

another person" does suggest that she is concerned with physical privacy. But her observation that separateness demands a "specific connection to one's environment" implies that separateness involves creating a living space that reflects one's individuality.

Radin makes other comments that support the view that separateness involves the creation (or location) of a self-expressive living space. She comments, for example, that the relationship between separateness and personhood demonstrates the need for stability of context. *Id.* One can achieve physical isolation in the midst of changing living conditions—imagine a fugitive fleeing justice or a wilderness enthusiast hiking the Appalachian trail. But assuming that a person's inner self enjoys at least a moderate degree of continuity, then an environment that was constantly in flux probably would not continue to resonate with an individual's personhood.

Radin may well believe that separateness demands both physical privacy and control over one's living environment. In that case, our proposal might actually advance one dimension of separateness while retarding the other.

¹²⁹ *Id.*, at xi-xiv.

analogous fashion. Radin would only prohibit the sale of our right to be left alone by direct marketers if as a consequence of these transactions we did not have enough solitude to flourish as human beings.

The ambiguous character of “[s]eparateness” and the fact that most Americans have little right to exclude telemarketing solicitations mean that the right to be left alone is unlikely to become bound up with individuals’ personhood. But even if the right to be left alone by direct marketers had become connected with the self, then our scheme would nevertheless *diminish* the amount of harm being done to personhood. Radin contends that the self is harmed or destroyed when personal property is “disconnect[ed]” from its prior owner. Market transactions are not the only means by which to “disconnect” something. A party can also disconnect an item by taking it without the prior owner’s permission. As we have already noted, the United States’ legal regime allows direct marketers to solicit most consumers virtually at will. So to the extent that these consumers’ right to be left alone has become connected with their personhood, it is also being disconnected on a more-or-less daily basis. Far from making matters worse, our approach would protect personhood by empowering all individuals to reduce or eliminate unsolicited solicitations. In today’s world, the only thing worse than commodifying individuals’ right to privacy is to leave the right uncommodified and in the control of the telemarketers themselves. Compared with the status quo, allowing consumers to commodify their privacy is likely to be productive of human flourishing.

3. Allen's Concern With Uncoerced Privacy

In "Coercing Privacy,"¹³⁰ Anita L. Allen wonders whether government should impose mandatory rules that give individuals more privacy than many would choose for themselves. She explores whether government should allow consumers to waive some but not all types of privacy.¹³¹ Allen makes two supporting arguments in favor of privacy coercion.

First, she argues that privacy is a prerequisite for moral autonomy and moral autonomy is a prerequisite for liberal democratic society, so government must protect privacy to save liberal democratic society.¹³² Note how far apart Sunstein and Allen are: Sunstein argues that we must restrict individuals' ability to be left alone in order to make them better citizens; Allen argues that we must restrict individuals' ability to waive (or sell) their rights to be left alone to make them better citizens.

To defend her thesis, Allen observes:

The argument of this Essay is structurally identical to an argument philosopher Samuel Freeman makes about drug policy. It would be illiberal to criminalize addictive recreational drugs in the absence of good evidence of substantial negative externalities, were clear-headed cognitive capacity not a requirement of responsible participation in a liberal democratic government. Similarly, it would be illiberal to coerce privacy were something approaching the ideal of morally autonomous selves not a requirement of participation in a liberal democratic society.¹³³

But even if one accepts Allen's argument in other contexts, the fact remains that most if not all of the countries generally regarded as liberal democracies tolerate direct marketing. So long as the United States, Great Britain and other countries qualify as such, then the extra measure of physical privacy associated with a prohibition on unsolicited solicitations cannot be a prerequisite for liberal

¹³⁰ Allen, *Coercing Privacy*, *supra* note 76. Anita L. Allen, *Lying to Protect Privacy*, 44 VILL. L. REV. 161, n.1 (1999), lists many of Professor Allen's articles about privacy.

¹³¹ Allen, *Coercing Privacy*, *supra* note 130, at 752.

¹³² *See id.* at 740.

¹³³ *Id.* (citations omitted).

democracy.

More abstractly, the purpose of regulations aimed at diminishing the volume of unsolicited solicitations is to prevent direct marketers from intruding upon consumers' solitude, a dimension of physical privacy. Persons do not need a substantial amount of solitude to behave morally.¹³⁴ Even though a person received one hundred telemarketing calls per day—plus dozens of unwelcome visits, etc.—that person would still be able to distinguish right from wrong and act on the basis of his moral intuitions. The notion that direct marketing could interfere with moral autonomy defies common sense.

Allen's second argument seems more relevant to our proposal. She argues that privacy markets—"opportunities to earn money and celebrity by giving up privacy voluntarily,"¹³⁵—erode the taste for privacy. In other words, markets construct tastes as well as respond to tastes.¹³⁶ Allen believes that preserving consumers' taste for privacy is essential not only because privacy is a prerequisite for liberal democracy but also because privacy has numerous other instrumental benefits.¹³⁷

Whether commodification diminishes individuals' valuations of an item depends, however, upon the status quo the privacy market replaces. Most debates about commodification are about whether ostensibly priceless items should receive monetary valuations. To adopt Professor Radin's language, we ask whether it injures a baby's personhood to say that the child is worth a fixed dollar amount.¹³⁸

¹³⁴ We imagine that if a person were subject to continuous intrusions of a wildly disruptive nature, then he might be rendered incapable of rational thought. But the sorts of intrusions we are imagining are the stuff of science-fiction—or crimes against humanity—rather than direct marketing.

¹³⁵ Allen, *Coercing Privacy*, *supra* note 130, at 731

¹³⁶ *See id.* at 735. Allen also complains that in contemporary society "numerous little consensual and nonconsensual privacy losses, too trivial to protest individually, aggregate into a large privacy loss that is a detriment to the liberal way of life." *Id.* at 740, 756.

¹³⁷ *See id.* at 737-741.

¹³⁸ *See supra* note 121.

Whatever regime we adopt to regulate babies or sex or body parts, we express our view that these things are enormously important by imposing criminal as well as civil penalties on parties that take them from their rightful owner or guardian without that party's consent. By contrast, direct marketers do not need an individual's consent to invade his physical privacy. Commodification, therefore, would mean a switch from a regime that values physical privacy at zero (since marketers can consumer it at will and without cost) to one in which physical privacy has positive value. The telemarketing raises a second meaning to the Mastercard term, "priceless." The transition from government-imposed pricelessness to market valuation may cause people to value the item less highly. But the switch from government-imposed worthlessness to market valuation should cause people to value it more highly.¹³⁹

The view that privacy markets would cause consumers to become accustomed to more frequent intrusions makes little sense since our approach should reduce the volume of most if not all kinds of solicitations. Our regime should reduce the overall number of solicitations by increasing the cost to direct marketers of contacting a consumer.¹⁴⁰ The only class of people for whom solicitations

¹³⁹ Given Allen's view that privacy supplies numerous instrumental benefits, *see id.*, she should also appreciate the fact that commodification of direct marketing would make consumers think about privacy-related issues. By inviting consumers to set a price for unsolicited solicitations, our approach impels them to reflect about how much they value their solitude. More basically, it reminds them that they have a right to be left alone—a right that they can choose whether and at what price to alienate.

Neither the status quo nor a mandatory ban on solicitations would engage consumers in a comparable manner. Since consumers cannot adjust the default setting, they have no reason to consider how much they value being left alone. These regimes are not only non-interactive but also largely invisible. Under a mandatory ban, for example, there would be no impetus for consumers to become cognizant of the fact that they enjoyed a right to physical privacy. The concept of solitude becomes meaningful when and if a person is subject to intrusions.

¹⁴⁰ The only type of direct marketing that might actually become more prevalent is spam, since a market approach would probably expand the range of companies that advertised by email even as it constricted the flow of emails sent by existing spammers. A market approach to spam would probably increase the number of companies that advertise by email since it would change the view that spam violates online etiquette. This view discourages companies that enjoy strong reputations and significant

may increase are those who currently opt for more extreme forms of interdiction—such as registering for the “don’t call” lists. But if these people, once given the opportunity, prefer to grant limited calling rights in return for compensation, we fail to see a compelling reason in terms of either human flourishing or external impacts on citizenship to warrant overturning their decisions.

While a variety of concerns have been raised about market-oriented attempts to “price privacy,” our proposal to grant households an alienable right to be free from commercial solicitations is likely to promote diverse conceptions of the good. Allowing people to protect themselves from commercial speech is likely to make them more open to non-commercial solicitations. And allowing citizens to commodify their privacy is far better than granting telemarketers the right to invade their privacy for nothing. Radin and Allen might respond that we should just abolish commercial telemarketing altogether, but that level of coercion is likely inimical to core free speech values and has not to date been seriously proposed.

III. Implementation

Having considered the theoretical underpinnings of a market-based approach, we are now ready to articulate how it would function. To that end, we develop a detailed plan for applying our approach to telemarketing.

There are several reasons to focus on telemarketing—as opposed to another kind of direct marketing.¹⁴¹ First, sales calls are more invasive (and annoying) than spam and direct mail.¹⁴² We can

consumer goodwill from sending spam.

A market approach would diminish the number of emails sent by companies that already use spam since the added cost would force them to target their advertising more narrowly—at the subset of consumers that is most likely to be interested in their particular goods or services.

¹⁴¹ Another reason to focus on telemarketing rather than spam is because scholars have devoted much less attention to the former. The literature on solving problems associated with spam is

at least choose at what point during the day we want to sort through our (e)mail. Second, telemarketing is the biggest business. Total expenditures by sellers and sales to consumers are larger for telemarketing than any other kind of direct marketing.¹⁴³ Third, there are fewer obstacles to the application of a market-based solution to telemarketing than other kinds of direct marketing. As we explain in section C, a market-based approach to direct mail would have to surmount higher First Amendment hurdles

truly voluminous. See, e.g., Lorrie Faith Cranor & Brian A. LaMacchia, *Spam!*, 41 COMM. OF THE ACM 74, 80-83 (1998); Credence L. Fogo, *The Postman Always Rings 4,000 Times: New Approaches to Curb Spam*, 18 J. MARSHALL J. COMPUTER & INFO. L. 915 (2000); David E. Sorkin, *Unsolicited Commercial Email and the Telephone Consumer Protection Act of 1991*, 45 BUFFALO L. REV. 1001 (1997); Anne E. Hawley, Comment, *Taking Spam Out of Your Cyberspace Diet*, 66 UMKC L. REV. 381 (1997); Jeffrey L. Kosiba, Comment, *Legal Relief from Spam-Induced Internet Indigestion*, 25 DAYTON L. REV. 187 (1999); Simmons, Comment, *supra* note 19.

¹⁴² Rosenfield, *supra* note 31, at 15-16, relates the following anecdote:

Telemarketing is indeed the medium everyone loves to hate, and hates to love. Which is why I am utterly intrigued by a mailing I just received from National Glaucoma Research. Its basic pitch is a promise not to call me on the phone!

The envelope copy, in faux-hand-writing, says: "I didn't want to bother you over the phone. I hope I made the right decision."

Above the salutation, the headline reads "The 'experts' say I'm wasting my time writing, that only by calling you at home can I hope to get your help . . . "

"Obviously," the letter continues, "I think those 'experts' are wrong.

"Because if you're at all like me, and I have reason to believe you are . . .

". . . You're sick and tired of people calling you at home, at the most inconvenient times, intruding into your life!

"But when I told the 'experts' NO, I couldn't do that to you, they said I'd regret it. I hope they're wrong, because I really need your help."

Wow! I don't know if this is blackmail or brilliance or both, but it sure got my attention! What cunningly manipulative copy

Supra, notes 2-70, provide quotations from several public figures about the peculiarly irritating quality of telemarketing.

¹⁴³ Direct Marketing Association, *2000 Economic Impact*, *supra* note 28; see also American Teleservices Association, *supra* note 60 ("Despite its emergence as a marketing and purchasing tool, the Internet still lags behind the telephone in consumer purchases. According to a consumer study conducted on behalf of the American Teleservices Association (ATA), 45% of Americans have initiated a purchase via telephone in the past year - compared with 37% who have initiated a purchase over the Internet in the same period.")

while a similar approach to spam would have to overcome more serious technological obstacles.

A. Our Preferred Approach

Our basic mechanism would force telemarketers to call from what we call an “outgoing 1-900” number. With traditional (“incoming”) 1-900 numbers, a payment from the caller to the recipient is triggered by a call *into* a recipient’s 1-900 number. Outgoing 1-900 numbers work the same way except that the payment is triggered by calls made *from* a 1-900 number. When a telemarketer called a residence using an outgoing 1-900 number, the local phone company would automatically credit the residence’s phone bill for an amount chosen by the resident. Just as the resident pays a per-minute charge set by the recipient when she calls the psychic hotline, the psychic hotline would pay a per-minute charge chosen by the recipient if it chooses to drum up business by calling the resident. Notice the symmetry: if commercial establishments can demand that citizens pay them when the citizens call, we propose that citizens be able to demand that commercial establishments pay citizens when the commercial establishments call.

For concreteness, we would piggyback on many of the contours of the current “don’t call” statutes. Thus, for example, we would modify the current “don’t call” websites to include a small number of per-minute pricing options (for different times of day) and we would exempt from this requirement telemarketing calls made by non-profits and polling organizations.¹⁴⁴ Residences would

¹⁴⁴ Connecticut, for example, exempts eight different types of transactions: calls made with the consumer’s express permission; calls made by a non-profit organization; calls made in response to a visit by the consumer to the caller’s place of business; calls made in response to a consumer’s express request to be called; calls made to collect on a debt; calls made to an existing customer, unless they have requested not to be called; calls made by a telephone company in connection with creating or distributing telephone directories; and calls made by any person creating or distributing telephone directories on a telephone company’s behalf. In addition, new businesses may contact consumers on

retain the “no calls” option but instead could opt for different prices per minute for daytime, evening and nighttime calls (possibly specifying different prices for weekends). The website (and paper) forms would be constructed so that people who wanted an across-the-board price could easily make less nuanced decisions (akin to pulling the party level for \$1/minute any time or day). From the household end, registration would be trivially easy and would open the door to immediate compensation.

If a household failed to register, the default compensation they would receive would be the same as now—zilch, and the default prohibition against late night calls would remain in place unless the household opted for a different price (including potentially a zero price). We would, however, lift completely the prohibition against pre-recorded calls. But we would require—as discussed above—standardized, initial disclosure that a call is an unsolicited telemarketing call and of the amount of per-minute compensation.

Local phone companies could charge fees for using outgoing 1-900 numbers and effecting transfers of compensation, just as they charge fees for the use of existing (incoming) 1-900 numbers. The telemarketers would have access to the registered prices just as they currently have access to the “don’t call” list and could decide whether they were willing to pay the household’s registered price. Either the telemarketer or the household would have the option of terminating any individual call. Partial minutes would be rounded up to determine the total time of the call.¹⁴⁵

The local phone companies could also play a roll in verifying to the consumer that a particular telemarketing call was in fact paying compensation. At the same time that a household registered its

the state “don’t call” list, but are still governed by restrictions on calling hours and the use of recorded messages. CONN. GEN. STAT. ANN. § 42-288a (1997)(amended 2001).

¹⁴⁵ This rule dampens incentives for telemarketer shenanigans and compensates the recipient for the time and inconvenience of going over and picking up the phone.

price with the state, the household could list a 3-digit pin code (or possibly choose from fifty sound clips). The phone company would be given the pin numbers, but not the telemarketers. The outgoing 1-900 number software of the local telephone company could then be set up to announce the PIN code at the start of the call (outside of the telemarketer's earshot) so that the resident would immediately know that the call was a valid (i.e., compensating) telemarketing call. People receiving a telemarketing pitch that was not preceded by the telltale tone or PIN would have immediate notice of a violation.¹⁴⁶ Granting citizens a private bounty for identifying violators could maintain the viability of the legal mandates.¹⁴⁷

These few paragraphs give the basics of a workable market system. This is a system that doesn't require a technological breakthrough to implement. And while for simplicity we have cleaved to many of the regulatory choices already embodied in "don't call" statutes, there are many regulatory details that deserve further elaboration. We turn our attention to those in the remainder of this section.

¹⁴⁶ Another problem with direct marketing is the fact that parties engaged in solicitation have an incentive to mislead consumers, to mislabel their product, and to disguise the nature of their communication with consumers. But as discussed above, this is solved through standardized, initial labelling—the distinctive tone or sticker or subject heading or phrase—and by addressing the consumer using a unique username unknown to the telemarketer.

¹⁴⁷ The effectiveness of private enforcement may be seen from the story of a consumer who successfully sued AT&T under the TCPA for continuing to make telemarketing calls after he asked them to stop. See N.A.M.E.D. News Service, *AT&T Loses Suit over Telemarketing Calls* (last modified Aug. 13, 1999) <<http://www.stopjunkcalls.com/at&t.htm>>. Private Citizen reports that its customers have collected over \$1 million since 1996 in damages against telemarketers who called Private Citizen members. See Private Citizen, *Homepage*, (visited Feb. 13, 2002) <www.privatecitizen.com>. See also Cox, *supra* note 13, at 412-13 (discussing *Szefczek v. Hillsborough Beacon*, 668 A.2d 1099 (N.J. Super. Ct. 1995)).

B. The Pricing Mechanism

As with the design of auctions, there are a myriad of alternative rules that can equilibrate toward a market price. Here we discuss three crucial dimensions—who offers the initial price; what is default price, and what are the rules governing opt-out.

1. Who Should Offer the Price

While our preferred approach allows consumers to set the price they demand as compensation, it would be possible to alternatively establish a regime where the telemarketers chose the price they were willing to offer.¹⁴⁸ Indeed, our forgoing discussion of requiring standardized, initial disclosure amounts to just such a system.¹⁴⁹ Imagine, for example, that telemarketers were merely required to disclose at the outset of the pre-recorded message, “The telemarketer offers to pay you \$xx cents a minute to listen to the following call,” where xx was an amount chosen by the telemarketer. This regime would effectively give the telemarketers the power to set the initial price.

Under our preferred household-choice system, the household sets the price of compensation and the telemarketer decides whether it wants to call. In contrast, under this telemarketer-choice system, the telemarketer sets the initial price and the household decides whether it wants to accept the call. Under either system, the non-price setter would be able to decide whether she wanted to participate—and accept the offer.

Indeed, enlightened regulation should facilitate automated filtering by the offeree. In a

¹⁴⁸ It would also be possible to have public officials choose the price. See Petty, *supra* note 3, at 46 (“regulators should conduct rate hearings to determine how much consumers would like marketers to be charged on a per minute basis for the right to make such calls.”).

¹⁴⁹ See *supra* Part II.A.

household-choice system, the telemarketer is likely to set up an automated program refusing to call consumers that have posted prices that exceed some maximum amount. Similarly, a telemarketer-choice system should make it easy for households to refuse any calls that offer too little.

Standardization is the key to efficient consumer filtering. Forcing telemarketers to state their offered compensation at the beginning of the call goes a long way, because consumers can simply hang up on low-ball offers. But this hang-up strategy still forces consumers to go over and pick up the phone and repeatedly choose. We could do better by forcing the standardized disclosure to come even earlier—by including information about the price the telemarketer offers in the telemarketer’s own phone number. The 1-900 numbers used by telemarketers could include two or three-digits expressing how many cents per minute they were offering to consumers. The telemarketers would still be free to offer any amount that they wished, but Caller ID systems (or new services offered by the local phone company or government itself) could automatically block any calls that fell below the consumer’s reservation price.¹⁵⁰

Some might worry that a telemarketer-choice system would be useless since telemarketers would cling to their present practice of offering no compensation. But this system would differ importantly from the status quo because households would know that telemarketers had a practical option of compensating listeners. We predict that telemarketers under this system of disclosure would be forced by competition with other telemarketers to offer compensation. Indeed, far from the status quo, a telemarketer-choice regime with automated filtering by households is likely to be largely

¹⁵⁰ This telemarketer-choice cum consumer filter is analogous to a policy that Larry Lessig has suggested to control spam. See Lawrence Lessig, *What Things Regulate Speech: CDA 2.0 vs. Filtering*, 38 JURIMETRICS J. 629 (1998).

equivalent to a household-choice regime with automated filtering by telemarketers.¹⁵¹ To the extent that the regimes differ, we prefer the household-choice system because it is less cumbersome—producing fewer filtering costs and imposing the costs on the telemarketers instead of the consumer.

But we should note in closing that neither consumers nor telemarketers have the incentive to choose the socially efficient price. Ideally, we would like the price chooser to pick her reservation price, so that the offeree would have an incentive to accept all socially beneficial offers. Unfortunately, a hyper-rational chooser may have an incentive to set the price in a more self-interested manner. For example, a resident may not be content with setting a price to compensate for the telemarketing inconvenience; he or she may instead try to profit from telemarketing by charging a supra-competitive price—one that deters some socially beneficial calls. This theoretical concern should not detain us long. We face analogous concerns in many other contexts without resorting to price regulation or abandoning the market altogether. There are enough consumers and telemarketers to trust the competitive process to produce an equilibrium that will be massively more efficient than either *laissez faire* telemarketing or the interdictive alternatives discussed above.

¹⁵¹ Indeed, instead of prohibiting telemarketers from calling any household whose price was above the telemarketers' willingness to pay, the state could offer a filtering service to block, on households' behalf, any call that did not offer sufficient compensation. Under this system, telemarketers could try to call anyone they wanted (as long as they electronically disclosed their offered compensation), but they would only be able to get through when their offered compensation exceeded the household's demand.

Households somewhat perversely might be better off under a telemarketer-choice system with household filtering than under a household-choice system with telemarketer filtering. If the telemarketer is kept uninformed about the size of the household filter (i.e., the minimum compensation that the household demands), then the household might receive initial compensation offers that exceed their reservation price.

2. Default Choice

While hyper-rational residents may as a theoretical matter have incentives to set prices that are too high, we are more concerned about the much more real problems of ignorance and inertia. An important lesson from the state experience with “don’t call” statutes is that it is difficult to educate and motivate residents to act.¹⁵² Quick—do you know whether your state has a don’t-call statute?¹⁵³ And if it does, have you failed to register because of simple inertia? As in other contexts,¹⁵⁴ the default price demanded when households are silent is likely to have a large impact on the ultimate equilibrium. Just as Sovern proposed an opt-in default, which presumptively banned telemarketing calls unless a household registered on a “Please Call” list,¹⁵⁵ we are deeply attracted to presuming some level of compensation that would govern all households unless the household affirmatively moved to increase or decrease the default.

Default prices that are either substantially higher or lower than the price that households would normally choose could be considered “penalty” defaults that would give households an incentive to affirmatively opt for their preferred prices. But in this setting the rationale for “penalty” defaults is largely lacking, because the central problem isn’t that households have private information that we want

¹⁵² Cox, *supra* note 13, at 424 observes, “The trouble [with existing regulations] is twofold. First, most people are uninformed. They are unaware of “do-not-call” lists and so do not know how to protect themselves.”

¹⁵³ Alaska, Alabama, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Idaho, Indiana, Kentucky, Louisiana, Maine, Missouri, Montana, New York, Texas, Tennessee, Wisconsin, and Wyoming currently have “don’t call” lists. Michigan New Jersey, Pennsylvania, and Ohio have pending legislation that would create “don’t call” lists. *See supra* note 4.

¹⁵⁴ *See* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L. J. 87 (1989).

¹⁵⁵ *See* Sovern, *supra* note 11.

them to reveal by contracting around the default. The central problem is that households may not know that they have the option to be compensated and to control the amount of compensation. Penalty defaults that are set too high (say, \$10 per minute) or too low (say, \$0 per minute) are in fact less likely to inform residents that compensation is possible because neither default is likely to give rise to any compensation for the silent majority. Under a \$10 default, no telemarketers will call, and under a \$0 dollar default, none of the calls will be compensated. In the telemarketing context, the beauty of setting a modest, but positive default price is that it will quickly inform residents about the new potential for compensation. Each month's phone bill will disclose the telemarketing credits that the household receives (and might disclose how the consumer could vary the default price).

We are particularly attracted to using the federally mandated minimum wage as a focal point to measure how much people should value their time. On a per-minute basis, the minimum wage currently amounts to about nine cents.¹⁵⁶ If workers deserve at least nine cents a minute, then residents deserve at least this amount to help a for-profit enterprise market its product. And make no mistake, the person who takes time to listen to a marketing pitch is helping to market a product. This measure might even be taken as a rough measure of what a majoritarian default would be.¹⁵⁷

In the end, however, we have opted for the status quo defaults, which effectively set a zero

¹⁵⁶ Federal minimum wage is currently \$5.15 per hour. *See* United States Department of Labor, *Wages, Minimum Wage* (last modified Feb. 14, 2002) <<http://www.dol.gov/dol/topic/wages/minimumwage.htm>>. On a per minute basis, this amounts to \$0.0858.

¹⁵⁷ Alternatively one could more directly try to estimate what the majority of residence would want by taking a survey of consumer preferences. As is often the case, much would turn on how the questions were phrased. Our informal surveys to an admittedly non-random sample found massively different answers if we simply posed the question in terms of dollars per minute versus cents per minute. And there are even more vexing questions about the degree to which more nuanced preferences concerning the pricing of different times or types of telemarketing should be elicited.

price for daytime calls and an infinite price for nighttime calls. These extreme status quo defaults—as argued above—are less likely to provide households with the information from actual phone credits about the new opportunities for compensation. But if the status quo defaults are combined with our proposed requirement that telemarketing calls begin with a disclosure of the offered compensation, we are confident that most Americans will soon become very aware that their attention has a market value. Cleaving to the status quo is also likely to ease the transition for telemarketing companies that will need time to adjust to the new regime.

The only price where we might not accept the status quo concerns pre-recorded messages. The current prohibition against such calls (like the prohibition against nighttime calls) can be thought of as an effective infinite price. But while we would retain the default prohibition against nighttime calls, we would allow pre-recorded calls if the telemarketer paid the listener the minimum wage (nine cents per minute). Under this default, the telemarketer would on the margin save the expense of paying the speaker and instead would have to pay the listener.

3. Opt-Out Rules

Beyond determining a default price, any system of household choice must determine the ways that households are allowed to opt out of the rules. In abstract terms, this means, “How refined should a household’s pricing authority be?” In concrete terms, this means, “How should the web-page or paper form be designed to allow opt-out?” In one sense, this design issue should simply be driven by pragmatic considerations of trying to economize both on the consumer’s time and on the administrative burden of implementing pathologically intricate preferences.

As an initial matter, we recommend simplicity so that a resident visiting the site could register in

one or two minutes. This probably means providing simple options to apply a single price for all daytime and evening calls and another price for nighttime or weekend calls. More advanced users might be given options to vary the price of pre-recorded calls or set day-specific or day/hour-specific prices. The site also might allow residents to charge what economists call a “two part tariff”—requiring a lump sum for listening to the first minute of a call and a second (usually lower) price for listening to additional minutes. The opt-out system in essence would mirror the types of variations that have been seen in long distance calling plans—with some sellers offering simple one-price plans, while others offer plans contingent on day, time or length of call.

It might also be advisable for the site to offer alternatives that delegate the pricing authority to intermediaries who would be authorized to revise the pricing schedule over time until the household opted to check a different box. It might be convenient for consumers to click the “Good Housekeeping” box, or the state’s own “best practice” box rather than taking the time to calculate the optimal pricing scheme.

For reasons of administrative convenience, we do not recommend that the state entertain pricing schemes that are contingent on the content of the commercial telemarketing solicitations. We would allow time- and manner- (pre-recorded vs. live) contingent pricing but not content-contingent pricing. This would mean that a resident would not be able to charge more to listen to aluminum siding solicitations. The number of potential content contingencies is despairingly large and telephone companies pricing software would need to have a mechanism for distinguishing different types of content. This is a swamp we would like to avoid.¹⁵⁸

¹⁵⁸ But intermediaries might play a useful roll here. Good Housekeeping could literally give its seal to only certain solicitations and the telephone company would have a fairly objective basis for

C. Exempt Solicitations

Just as the current “don’t call” statutes prohibit residents from blocking particular types of solicitations, our market proposal would prohibit consumers from demanding compensation for certain calls.¹⁵⁹ On the ground, telemarketers making calls that fit within an exemption would not be required to use an “outgoing 1-900 number” to initiate the calls. There are two basic rationales for the existing exemptions, which we term “positive externalities” and “consumer consent.” The latter category includes situations in which the consumer has expressly or implicitly consented to waive compensation. The former category concerns calls for which there are thought to be positive third-party externalities to the call that override the consumer’s interest in being left alone.

discriminating between sealed and unsealed calls. The consumer would also retain the right to opt out of particular solicitations in a piecemeal fashion by requesting that particular companies remove their names from the list.

¹⁵⁹ In terms of contract theory, the mandatory price for these calls would be zero with no option of opting out.

1. Positive Externalities: Charities, Polling and Politics

While positive externalities are traditionally a perfectly respectable rationale for mandatory rules,¹⁶⁰ there are important limits to what these mandatory exemptions can accomplish—because households retain the right to hang up. As discussed above, the strategies that households adopt to avoid phone solicitations (such as taking an unlisted number) can themselves produce negative externalities that must be weighed against the third-party benefits. While we might want to prohibit compensation for charitable calls in a world where households could not hang up or de-list their numbers, we might not want to ban compensation in a world where these tactics are allowed.

Even if the law exempts particular classes of calls from offering compensation, it is less clear whether they should also be exempt from the same kinds of standardized, initial disclosure that are required of other telephone solicitations. Indeed, there turn out to be three separate questions: which types of telemarketing should be implicitly subsidized; how big should the subsidy be; and who should pay the subsidy?

The traditional answer to the first question is that charitable and polling solicitations produce sufficient third-party benefits to be exempt from telemarketing restraints. We shall devote most of our attention to evaluating this traditional viewpoint. But reconceiving the issues in terms of implicit subsidies allows us to disentangle the other two questions.

Exempting telephone solicitors from a disclosure requirement is a separate and additional subsidy distinct from the exemption from paying compensation. For example, are the social benefits from charities sufficiently great that it warrants hoodwinking listeners into initiating conversations that

¹⁶⁰ See Ayres & Gertner, *supra* note 154.

they would have preferred not having? To our minds, while there is a (contestable) case for the compensation subsidy, promoting charitable contributions by facilitating semi-deceptive solicitation practices which make it more difficult for households to maintain telephonic privacy is untenable.

Recharacterizing the exemptions as implicit subsidies also allows us to ask the incidence question about who should bear the cost of the subsidy. When we see charitable solicitations in the all-or-nothing terms of the current don't-call statutes it seems clear that households must bear the inconvenience of charitable exemptions. But under our market proposal, where residents post prices, it becomes possible for the government to bear the cost of exempting charities (or survey organizations) from the duty of paying compensation. If the government feels that it is socially beneficial for the charities to be able to solicit without paying compensation, the government is well placed to pay the compensation on the charities' behalf so that the costs of solicitation will be borne by the public more generally instead of disproportionately by those unlucky ones who are called or solicited disproportionately. After all, the government subsidizes charities by effectively making a co-contribution for every private dollar; it might find it worthwhile to subsidize charitable solicitations as well by picking up part of the cost of soliciting. Indeed, once we conceive of residents as having an alienable entitlement to sell their attention, the government's exemption of particular types of telephone solicitation starts looking like an uncompensated taking.¹⁶¹

In sum, there is a strong case for maintain a duty to disclose on all mass telephone solicitations and at least an argument for maintaining the duty to compensate (but having government reimburse the

¹⁶¹ We nevertheless rush to emphasize that we do not believe this would make out an actionable claim under the Constitution's Takings Clause. For a good general discussion of the jurisprudence relating to the Taking's Clause, see BRUCE ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION*, chs.2, 4 (1977).

solicitors that it deems worthy). But we do not propose to tilt at all possible windmills in this article. Instead, we cleave largely to the exemptions that tend to appear in the current “don’t call” statutes concerning non-profit charitable and political organizations as well as polling—and propose extending them to exemptions from a duty to compensate, as well.

The core classes of exemptions which are at least arguably based on third-party benefits are solicitations by charities, political groups and polling organizations. The idea here is that charitable contributions further more general public interests or that political communications help secure better government for all. And while political polling is sometimes decried,¹⁶² opinion polls may at times provide positive externalities—so that we learn what we collectively think about an issue or how we in aggregate behave.¹⁶³ The Connecticut “Don’t Call” statute, for example exempts not only charitable solicitations, but all calls made “for a non-commercial purpose, such as a poll or survey.”¹⁶⁴ Likewise, the TCPA’s definition of a telephone solicitation expressly excludes calls from tax-exempt non-profit organizations.¹⁶⁵

¹⁶² See *supra* note 40.

¹⁶³ Connecticut also exempts calls by telephone companies for the purpose of eliciting information to construct telephone books. These “white pages” surveys produce the kind of positive externality effects that analogously might justify a compensation exemption. See CONN. GEN. STAT. ANN. § 42-288a(e)(2) (1997) (amended 2001).

¹⁶⁴ Department of Consumer Protection, State of Connecticut, DCP Telemarketing No Call List (visited March 2, 2002) <<http://www.state.ct.us/dcp/nocall.htm>>. We think this wording is slightly infelicitous. Many surveys related to consumer marketing are distinctly made for a commercial purpose, and in a world with “push polls” one could imagine surveys that were really disguised advertisements (“Did you know that Sears was having a sale today?”). Moreover, the statute never addresses the use of telemarketing to convey information rather than to elicit it. Political communication is decidedly a two-way street and exemptions should expressly include uses of the telephone to disseminate the news. We wouldn’t want a telemarketing law that stopped Paul Revere.

¹⁶⁵ See 47 U.S.C. § 227(a)(3)(1991). Cain, *supra* note 68, at 649 n.59, writes, “The exemption for non-profit organizations are [sic] dictated by the First Amendment decisions by the Supreme Court that give charitable solicitors greater protection than commercial speech under the

There is some evidence that the general public finds these types of calls less annoying than commercial solicitations.¹⁶⁶ As summarized in Table 1, the Field Research Report found that people were three times more likely to report that they “did not mind” charitable solicitations than sales calls and five times more likely not to mind opinion polls.¹⁶⁷ And the House of Representatives Report prepared in conjunction with passage of the TCPA cites data from the National Association of Consumer Agency Administrators indicating that the vast majority (ranging from 80% to 99%) of complaints in the nine states surveyed were about “commercial” (as opposed to “charitable”) calls.¹⁶⁸

Table 1: Public Reactions to Different Types of Phone Solicitations (percent of responses)				
Reaction	Sales Calls	Charitable Solicitation	Political Solicitation	Opinion Poll
“Did Not Mind”	9.1%	27.1	43.4	50.2
“Liked”	.1	.2	1.7	3.7

There are nevertheless reasons to question the utility of these exemptions. While more respondents minded sales calls than minded charitable, political and survey calls, Table 1 shows that the latter ‘public interest’ calls still bothered a large percentage of survey participants. A clear majority did mind both charitable and political solicitations, while nearly half objected to opinion polls. And virtually no one reported liking these calls. There are also concerns that both charities and political organizations are making growing numbers of unsolicited calls, creating an overfishing problem.¹⁶⁹ The advent of

compelling interest standard.” *See generally* Nadel, *supra* note 13, at 108-09 (discussing the definition of an unsolicited telemarketing call).

¹⁶⁶ One must be concerned, however, that people who were willing to take part in these surveys were not representative of the larger public overall.

¹⁶⁷ Field Research Corp., *The California Public’s Experience with and Attitude Toward Unsolicited Telephone Calls* 9 (Mar. 1978) (unpublished report prepared for the Pacific Telephone Company on file with the *Yale Journal on Regulation*).

¹⁶⁸ H.R. REP. NO. 102-317, at 5 (1991).

¹⁶⁹ American Teleservices Association, *Nearly 60% of Americans Received One or More Campaign-Related Phone Calls During the 2000 Election Cycle* (visited Feb.14, 2002) <http://www.ataconnect.org/htdocs/consinfo/consumer_study_march-feb01.htm>. The American Teleservices Association sponsored two telephone surveys on February 16-18 and March 2-4, 2001 of 1,000 consumers about their use of telephones, the Internet, and related services. The research was conducted by Market Facts, Inc. *See* American Teleservices Association, *Telephone Still Favored Purchasing Channel* (visited Feb. 14, 2002)

aggressive political “push polls” and professional donation solicitors—who will gladly troll the phone book on behalf of any policeman’s benevolent association that is willing to pay their fee—has degraded the appearance of public interest and contributed to listener overload.¹⁷⁰ And in addition to the households’ disutility, the social utility of calls soliciting charitable donations is increasingly contestable given the small proportion of total revenues that is made available for the charity itself.¹⁷¹

We are attracted to an intermediate solution: giving households the option of seeking compensation from any of these traditionally exempt groups but capping the maximum amount of compensation at the rate the speaker is being paid. If the speaker is working gratis for a grassroots political campaign, then the households could demand nothing. But if the speaker is being paid minimum wage to conduct a push poll for Bloomberg, or for soliciting contributions to the local dog shelter, we see on a strong case for allowing households to seek the same amount to have to listen to the message. Of course households would not be required to seek this amount, but allowing households to charge a modest fee would likely reduce the worst excesses that are beginning to occur today and possibly increase households’ receptiveness to a broader range of solicitations.¹⁷²

We are not, however, willing to incur the wrath of the entire eleemosynary lobby and so we recommend that charities, political groups and polling organizations be completely exempt from the duty to compensate. As explained below, this greatly reduces constitutional concerns with our proposal. It

<http://www.ataconnect.org/htdocs/consinfo/consumer_study_march-feb01.htm#telephone>.

¹⁷⁰ Some charities also add to the commercial abuse by selling to commercial telemarketers the names and phone numbers of their contributors. See Tom Mabe Revenge on Telemarketers, *Did You Know...?* (visited Feb. 14, 2002) <www.tommabe.com/facts.php>. Indeed, some charities generate substantial revenues by selling phone lists of contributors—so if our market approach diminished the size of the telemarketing industry, it might indirectly harm even some exempt charities.

¹⁷¹ On average, approximately one-quarter to one-third of what you donate as a result of a telemarketing call will actually get to the charity on whose behalf the solicitation is made. The telemarketing company hired to make the call gets the rest. See Attorney General of Ohio, *Take Time to Give to Charities* (last modified Dec. 6, 1996) <http://www.ag.state.oh.us/civilrts/columns/givewise.htm> (stating that charities receive, on average, 25% of the donated amount); Fran Silverman, *Worrisome Hang-Ups Charities Fear Telemarketing Law Will Curb Giving*, HARTFORD COURANT, Jan. 5, 2001 (quoting Daniel Borochoof, president of the American Institute of Philanthropy: “[Making a charitable donation in response to a phone solicitation] is not a very effective way of giving away your money. There is a lot of waste On average, only about one-third of the money raised goes to the charity.”); Tom Mabe Revenge on Telemarketers, *supra* note 170 (stating that charities receive on average 24% of the donated amount).

¹⁷² Interestingly, the proposed FTC rule adopts a similar intermediate position by allowing residents to block charitable solicitations made by for-profit intermediaries. See Notice of Proposed Rule Making, Telemarketing Sales Rule 16 CFR 310 (2002). The FTC’s power to regulate these solicitations was created by passage of the “USA Patriot Act,” Pub. L. 107-56 (Oct. 25, 2001) passed in the aftermath of the September 11th attack. The act expands the definition of “telemarketing” to include solicitations of “a charitable contribution, donation, or gift of money or any other thing of value.” *Id.*

also avoids the perverse possibility that people might become less inclined to participate in public spirited events if they gained the opportunity of being compensated.¹⁷³ There is still a limit to our philanthropy toward philanthropies. We would not allow exempted organizations to take advantage of pre-recorded solicitations unless they paid the amounts requested by individual households. Exempting non-profits from the duty to compensate listeners and simultaneously reducing their cost of speaking would likely spur a feeding frenzy that could be worse than the status quo.

A final question is whether there are any other types of calls that deserve the implicit subsidy of exemption from required compensation. Some people have proposed that small businesses should qualify—because they are especially needful or are the well-spring of economic growth.¹⁷⁴ Meanwhile, the Connecticut “don’t call” statute exempts calls from new businesses (defined as solicitors for whom “a period of less than one year has passed since such telephone solicitor first began doing business in this state”).¹⁷⁵ We respectfully dissent. We see no reason why the benefits of creating or expanding small or new businesses should be paid for with domestic privacy. If the commercial solicitations of these businesses are worthy of subsidization, we say let the general fisc bear the cost.

2. Policing “Consumer Consent”

The second group of exempt solicitations stands on a very different footing. The purpose of our market approach is to force “unsolicited” callers to compensate listeners for their time—giving the listener an opportunity to consent in advance and thereby solicit the intrusion on her time. But it is perfectly reasonable to provide exemptions from compensation where the listener has already explicitly or implicitly consented to the call—and so waived the compensation requirement.

Of course, as soon as telemarketers see the possibility of avoiding the compensation requirement, they will try to position themselves to fall within the consent exemption. The law will have to police difficult issues concerning the quality, scope, and durability of consent. Luckily, many of these issues have already been under discussion for several years with regard to parallel issues on the Internet.¹⁷⁶ We suggest that consent be unbundled and non-durable. A potential, existing or past

¹⁷³ There are reports that blood donations have declined when blood banks started paying for some of their blood. See RICHARD M. TITMUSS, *THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY* (1971).

¹⁷⁴ It is a political truism that small businesses are responsible for the creation of a large number of the jobs in this country. For example, the 2000 Republican Party Platform states: “Small businesses create most of the new jobs and keep this country a land of opportunity.” See Malla Pollack, *Opt-In Government: Using Internet to Empower Choice-Privacy Application*, 50 CATH. U. L. REV. 653, 669 n. 72 (2001) (citing similar passages in both the Republican and Democratic party platforms).

¹⁷⁵ See CONN. GEN. STAT. ANN. § 42-288a(c)(1)(B) (1997) (amended 2001).

¹⁷⁶ Various industry “best practice” proposals encourage retailers to obtain consumers’ consent prior to sending email advertisements. See e.g., T. Gavin, Nachman Hays Consulting, Intel Corp., *How to Advertise Responsibly Using Email and Newsgroups or how NOT to MAKE ENEMIES FAST!* (last modified Apr. 2001) <<http://www.ietf.org/rfc/rfc3098.txt>>. One proposal to regulate

consumer should have to affirmatively waive the right to be solicited to buy additional products or services. The waiver should be unbundled from other transactions and waiver should require some affirmative act (as opposed to passively accepting a default waiver).¹⁷⁷ And as a prophylactic, we suggest that the waiver only be effective for some limited period—perhaps two years. The business’s right to solicit without paying compensation should not be assignable to other companies—otherwise, waiving compensation from one business could effectively provide a waiver to all businesses. Assignable rights create too large a temptation for firms to hoodwink consumers into granting overly broad consent. A household that wanted this result could more easily just eliminate the general compensation it was seeking.

The “don’t call” statutes have made a first attempt at policing household consent. The Connecticut statute, for example, exempts four classes of calls where consent is express or presumed. To wit, calls made: with “the consumer’s prior express written or verbal permission;” “in response to a consumer’s visit to an establishment with a fixed location;” in collecting an existing debt “that has not been paid or performed;” and “to an existing customer.”¹⁷⁸

We find no fault with the first or the third exemption. Express consent is the gold standard (if based on a sufficiently affirmative and knowing act) and it should be presumed that borrowers consent to allow uncompensated calls regarding collection of a debt that is in arrears. The second and the fourth exemptions are, however, more problematic. We do not believe that merely visiting a car dealership should be seen as implicitly consenting to waive your domestic privacy. Let the dealership obtain a more affirmative waiver, if it wants to follow up. And the existing customer exemption is overbroad. We agree that businesses should be able to call (without compensating) about issues arising out of the performance of an ongoing contract—so that a car repair place could call to tell the consumer she really needs a new transmission. We might also presume that businesses could call to remind customers about renewing periodic services—so your dentist or a lawn-service could call to tell

“spam” under federal law would simply add “electronic mail address” to the existing legislation prohibiting the sending of advertising to fax machines. *See* H.R. 1748, 105th Cong. (1997). The legislation would require either (1) a pre-existing and ongoing business or personal relationship between the mailer and the recipient or (2) the recipient’s express permission before a commercial email could be sent. *See id.*

¹⁷⁷ However, we would allow the seller to warn the consumer once that the consumer was about to miss an important opportunity.

¹⁷⁸ *See supra*, note 144.

you it was time for your yearly check up. But we do not think that businesses should be given *carte blanche* to solicit existing customers to purchase new kinds of products or services. The bank that manages my checking account should not be given authority to pitch a home-mortgage or life insurance to me. The existing customer exemption creates a perverse incentive by banks to become the intermediaries for a host of unrelated products. After all, who is going to want to refuse to listen when their bank calls? Unfortunately, this has begun to happen in Connecticut.¹⁷⁹

D. Constitutionality

The argument for our proposal's constitutionality is straightforward. *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*¹⁸⁰ provides that a regulation of lawful, non-misleading commercial speech is constitutional if it (1) directly advances (2) a substantial government interest and (3) is not more extensive than necessary to serve that interest.¹⁸¹ Later decisions such as *Board of Trustees of the State University of New York v. Fox*¹⁸² indicate that the final prong of the *Central Hudson* test does not require that a regulation be the best or least intrusive approach to advancing a government interest; instead, it merely requires that there be a "reasonable fit" between the scope and invasiveness of the regulation and the extent to which it promotes the relevant government interest.¹⁸³

American courts have been incredibly amenable to laws regulating telephone calls—and commercial telemarketing in particular.¹⁸⁴ Indeed, there is a strong argument that because the all-or-

¹⁷⁹ Interview with Don Barkin, Adjunct Professor, Wesleyan University (Jan. 26, 2002).

¹⁸⁰ 447 U.S. 557 (1980).

¹⁸¹ *Id.* at 566.

¹⁸² 492 U.S. 469 (1989).

¹⁸³ *Id.* at 480.

¹⁸⁴ According to Cox, *supra* note 12, at 419, nearly every American court to review a telemarketing regulation has upheld it. The same authority observes that the District Court of New Jersey is the only jurisdiction which currently has valid precedent striking down telemarketing regulations. *Id.* (citing *Lysaght v. New Jersey*, 837 F.Supp. 646 (D.N.J. 1993); *but see Moser v. Frohnmayer*, 845 P.2d 1284 (Or. 1992) (holding that the prohibition of automatic dialing announcing devices violates the Oregon State Constitution). The Eighth and Ninth Circuits, the Minnesota Supreme Court, and at least one lower state court have all upheld telemarketing laws. *See Van Bergen v. Minnesota*, 59 F.3d 1541 (8th Cir. 1995); *Moser v. FCC*, 46 F.3d 970 (9th Cir. 1995); *Minnesota v. Casino Marketing Group, Inc.*, 491 N.W.2d 882 (Minn. 1992); *Szefczek v. Hillsborough Beacon*, 668 A.2d 1099 (N.J. Super. Ct. Law Div. 1995).

nothing “don’t call” regulations already in place in several states and proposed by the FTC are constitutional, our proposal which grants individuals greater freedom is *a fortiori* constitutional.

There are at least three lines of jurisprudence that render courts sympathetic to telephone-related regulations. First, courts are more receptive to restrictions on point-to-point media, such as mail and phone communications, than broadcast media, such as radio and television, because restrictions on the former—as opposed to the latter—need not prevent dissemination of messages to willing recipients.¹⁸⁵ Second, the more intrusive a mode of communication, the more authority the government has to regulate it.¹⁸⁶ The Supreme Court has held that aural communications are more intrusive than visual communications because they are more difficult to block out. Aural communications, therefore, justify more restrictive regulation of free expression than visual communications.¹⁸⁷ Third, persons frequently receive telephone calls at home. Communications received at home are the most intrusive kind of speech.¹⁸⁸ More generally, the Court is committed to upholding the principle that while consumers are in the privacy of their homes, they should be able to exercise a high degree of control over the kinds of communications to which they are subjected.¹⁸⁹

¹⁸⁵ See *FCC v. Pacifica Found.*, 438 U.S. 726, 766 (1978) (Brennan, J., dissenting); Nadel, *supra* note 12, at 104.

¹⁸⁶ See *id.* at Nadel, 101-03 (citing authorities).

¹⁸⁷ See *Kovacs v. Cooper*, 336 U.S. 77, 86-87 (1949) (Reed, J., plurality opinion); Deborah L. Hamilton, Note, “The First Amendment Status of Commercial Speech,” 94 MICH. L. REV. 2352, 2372 & n.92 (1996).) A ringing telephone is exceptionally difficult to ignore; we are conditioned to answer each phone call. James A. Albert, *The Constitutionality of Requiring Telephone Companies To Protect Their Subscribers from Telemarketing Calls*, 33 SANTA CLARA L. REV. 51, 52 (1993) (citing MYRON BENTON, *THE PRIVACY OF INVADERS* 176 (1984)), recounts the story of a suicide jumper who crawled off the ledge of a building and back into his apartment in order to answer a ringing phone.

¹⁸⁸ See Nadel, *supra* note 12, at 103. Cox, *supra* note 12, at 420, notes, “All of the courts . . . have held that the telephone is a uniquely invasive technology that allows solicitors to come ‘into’ the home.”

¹⁸⁹ For example, in *Rowan v. Post Office Department*, 397 U.S. 728, 736 (1970), the Court observes, “In today’s complex society we are inescapably captive audiences for many purposes, but a sufficient measure of individual autonomy must survive to permit every householder to exercise control over unwanted mail.” Later in that same opinion, the majority asserts:

The ancient concept that ‘a man’s home is his castle’ into which ‘not even the king may enter’ has lost none of its vitality, and none of the recognized exceptions includes any right to communicate offensively with another.

. . .

We therefore categorically reject the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another. If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even “good” ideas on an unwilling recipient. That we are captives outside the sanctuary of the

A market-based approach applying to sales calls by for-profit businesses would directly advance the substantial government interests in preventing cost-shifting and protecting consumer privacy.¹⁹⁰ In *Destination Ventures, Ltd. v. FCC*,¹⁹¹ the Ninth Circuit held that a statute prohibiting unsolicited advertising by fax directly advanced the government's substantial interest in preventing the shifting of advertising costs onto consumers.¹⁹² Specifically, the court held that the prohibition was justified because fax advertisements rendered faxes temporarily unavailable for other uses and compelled the recipient to pay for the special paper on which the faxes were printed. Needless to say, the court's rationale that government had the right to intervene to prevent advertisers from externalizing costs onto consumers mirrors our own rationale for proposing a market-based approach to telemarketing regulation.

The Court has repeatedly held that the government has an important interest in protecting the right of persons in their homes not to be made unwilling listeners.¹⁹³ Over the past decade, a series of

home and subject to objectionable speech and other sound[s] does not mean we must be captives everywhere. *Id.*, at 737-38.

We regard the "home" as a "sanctuary" in part because it is the one place in which we are not "subject to objectionable speech." *Id.* See also *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) ("[I]n the privacy of the home . . . the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." (citing *Rowan v. United States Post Office Dept.*, 397 U.S. 728 (1970))); *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371, 2376 (1995)

¹⁹⁰ Courts have recognized that other important government interests may be vindicated by telemarketing regulations. In *Van Bergen v. Minnesota*, 59 F.3d 1541, 1554 (8th Cir. 1995), the Eighth Circuit recognized that the government had a significant interest in promoting the efficient conduct of business operations. In *State v. Casino Mktg. Group*, 491 N.W.2d 882, 888 (Minn. 1992), the Minnesota Supreme Court recognized that the government had a significant interest in preventing fraud—but eventually concluded that the law under review was not sufficiently narrowly tailored to prevent fraud. *Cox, supra* note 12, at 420, discusses the several government interests recognized by courts in telemarketing cases.

¹⁹¹ 46 F.3d 54 (9th Cir. 1995).

¹⁹² In this case, the Oregon District Court found cost-shifting to be a substantial government interest and *Destination Ventures* did not contest this finding before the Ninth Circuit. The Ninth Circuit took note of this chain of events in its majority opinion. *Id.* at 56-57.

The District Court observed that the legislative history of the TCPA identified cost-shifting as a government interest. *Destination Ventures*, 844 F. Supp. 632, 635 (D. Or. 1994).

See generally *Marcus, supra* note 191, at 295-96 ("While no court other than the District Court deciding *Destination Ventures* has addressed whether cost shifting is a substantial government interest, several courts have held that the government has a substantial interest in regulating activities which may result in economic harm.")

¹⁹³ *Frisby v. Schultz* (citing *Consolidated Edison and Bolger*); see also *FCC v. Pacifica Found.*, 438 U.S. 726, 748-49 (1977) ("[I]n the privacy of the home . . . the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."); see generally *Cary v. Brown*, 447

state and federal courts have found that telemarketing regulations such as a law prohibiting the use of automatic dialing machines without live operators and the TCPA provision requiring telemarketers to maintain internal opt-out lists directly advance the governmental interest in residential privacy.¹⁹⁴

The fact that a law applying solely to phone solicitations by businesses would fail to regulate some activities—charitable fundraising and polling—that shift costs and invade privacy should not discourage courts from holding that the law directly advances these government interests. Though the direct advancement standard remains ambiguous,¹⁹⁵ numerous precedents affirm that partial or under-inclusive solutions can satisfy this prong of the commercial speech test.¹⁹⁶ In *Destination Ventures*, the defendant argued that a prohibition on fax advertisements failed the commercial speech test because it did not regulate other kinds of unsolicited faxes, such as prank faxes, that also imposed costs on consumers. Noting that advertisements constituted the bulk of unsolicited faxes—just as ordinary sales calls apparently constitute the bulk of phone solicitations—the Ninth Circuit rejected this argument. Meanwhile, the Minnesota Supreme Court upheld a telemarketing law that included a statutory exemption for non-profit organizations. The court remarked that the state is “free to believe that commercial telephone solicitation is a more acute problem than charitable telephone solicitation.”¹⁹⁷

There is also a reasonable fit between the extent to which our proposal suppresses speech and the degree to which it prevents cost-shifting and invasions of privacy. The only restraint a market-based approach places on telemarketers is that it forces them to internalize the costs they had previously

U.S. 455, 471 (1980) (“Preserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value. . . . The State’s interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.”)

¹⁹⁴ See *Van Bergen v. Minnesota*, 59 F.3d 1541, 1554 (8th Cir. 1995); *Moser v. FCC*, 46 F.3d 970, 974 (9th Cir. 1995); *State v. Casino Mktg. Group*, 491 N.W.2d 882, 888 (Minn. 1992); *Szefczek v. Hillborough Beacon*, 668 A.2d 1099, 1108 (N.J. Super. Ct. Law Div. 1995).

¹⁹⁵ Hamilton, *supra* note 198, at 2373-74 n.99, summarizes Supreme Court holdings on the direct advancement standard. She writes:

The Court has not indicated exactly what evidence satisfies the direct-advancement standard. The Court frequently says regulations that “directly advance” the government’s interest meet the standard, while those that provide only “ineffective or remote” support fail the test. The Court has indicated that “studies” could provide the basis for a judgment that a regulation materially advances privacy. In *Central Hudson*, the Court suggested that the direct-advancement requirement was satisfied by a “direct link” between the regulation and the government interest. *Id.*

On the basis of these pronouncements, Hamilton concludes that if the government had a substantial interest in reducing the frequency with which some phenomenon occurred, then a policy that achieved a 39% decrease in the occurrence of this phenomenon would satisfy the direct-advancement standard. *Id.*

¹⁹⁶ For a list of cases supporting this notion, see *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 442 (1993) (Rehnquist, J., dissenting opinion).

¹⁹⁷ *State v. Casino Mktg. Group*, 491 N.W.2d 882, 890 (Minn. 1992).

“shift[ed]” to consumers. Our proposal is literally no more extensive than necessary to prevent cost-shifting. The same cannot be said about the prohibition on fax advertising at issue in *Destination Ventures*; nevertheless, the Ninth Circuit held that there was a reasonable fit between the prohibition and the goal of preventing cost-shifting. Given the lenient manner in which the final prong of the commercial speech test is applied, courts would also be likely to hold that there is a reasonable fit between the extent to which our proposal discourages communication and the degree to which it protects residential privacy.

IV. Applications to Junk Mail and Spam

The same types of disclosure and compensation proposals that we have argued would ameliorate the problems associated with telemarketing could also be used to improve other conduits of direct marketing—such as junk mail and spam.

As discussed above, standardized initial disclosure would greatly facilitate household filtering of these media. If direct mailers were required to place a uniform symbol in the lower-left hand corner of an envelope, recipients could much more easily discard unopened junk mail without worrying whether the letter contained a tax form or check. And if spammers were obliged to place a uniform string in the subject line, existing email software could easily discard unwanted spam or transfer it to a bulk mail folder.¹⁹⁸ The low cost and effective filtering allowed by this simple disclosure requirement would provide most of the benefits of “don’t (e)mail” registries.¹⁹⁹ At the same time, it would give consumers the option of creating more nuanced filters than the all-or-nothing registries allow. In the shadow of the disclosure requirement, direct marketers are likely to stop hoodwinking households with non-solicitation solicitations (such as “important tax information enclosed”) and instead will provide more pertinent information to peak the consumers’ legitimate interest. Mail recipients might decide not to throw out all unsolicited mail—choosing, at least, to skim the contents of mailings that describe enticing offers on the envelope.²⁰⁰

Uniform standardized disclosure is already required on some junk mail—namely, junk mail from lawyers. Model Rule 7.3(c) mandates as part of a “labeling requirement” that every letter “from a lawyer soliciting professional employment from a prospective client known to be in need of legal services . . . shall include the words ‘Advertising Material’ on the outside envelope . . .”²⁰¹

¹⁹⁸ Ten states have laws regulating the labeling of unsolicited email advertisements. Seven states—California, Colorado, Florida, Nevada, Pennsylvania, Tennessee, and Wisconsin—require spammers to insert a uniform string of characters (such as “ADV:”) in the subject line. Three states—Illinois, Washington, and West Virginia—prohibit false or misleading labeling. *See* David Sorkin, Spam Laws: United States: State Laws: Summary (visited March 3, 2002) <<http://www.spamlaws.com/state/summary.html>>.

¹⁹⁹ Germany apparently has allow households to opt out of junk mail by putting a certain sticker on their mailbox.

²⁰⁰ Spam recipients might decide to retain unsolicited commercial emails that contain certain key words related to the recipients’ interests.

²⁰¹ Model Rules of Prof’l Conduct R. 7.3(c) (2001).

But as with telemarketing, we can do better than mandatory disclosure. There are parallel benefits to creating market-based regimes that allows recipients to “name the price” that they wish to be paid for receiving pieces of direct mail or spam. It would require only an additional two lines to add such a pricing scheme to current “don’t call” registry forms. Since traditional mail and email can be read at different times, such pricing would not have to be as intricately time-contingent as telemarketing compensation. And as with our preferred telemarketing system, the monetary transfers could be accomplished by the recipient’s local telephone carrier. Junk mailers would be required to use special postal meters that had an “outgoing 1-900” feature so that mailings to particular addresses would automatically trigger payments to the phone company. Unsolicited emails could work through a similar system or with some type of pay-pal software. Indeed, Larry Lessig has already suggested a similar system for compensating spam recipients – but usually with the amount set by the marketer or by the government.²⁰² While the aggregate harm of spam’s externalized costs is currently less than that of telemarketing, spam is distinctive for imposing no marginal cost on the telemarketer. Telemarketing and junk mail are at some point self-limiting because it costs something to send a package or to pay someone to place a call.

In fact, the purity of the market failure associated with spam—the fact that almost all of the marketing costs are externalized—may have provoked our insights into telemarketing. Our market approach to telemarketing has been technologically feasible for many years; it requires nothing more complicated than the software that gave us 1-900 numbers. But the internet has underscored not just the value of people’s attention (aka their “eyeballs” and “eardrums”), but the possibility of compensating them for their time. While we have centered our arguments on the most important direct marketing abuse, we might just as easily have started our narrative with junk mail or spam—where the benefits of standardized initial disclosure and consumer-driven compensation are to our minds abundantly clear.

Conclusion

This article argues for the creations of a market in the right to be left alone by telemarketers (and spammers and junk mailers). All types of direct marketing externalize costs onto consumers; all are amenable to the same basic solution. Rather than giving households the all-or-nothing choice of the “don’t call” statutes, we should allow households to condition access to their homes on payment of some minimum requisite compensation. Telemarketers (and other direct marketers) should be required to disclose the nature of the communication at the outset in a standardized manner. Giving households more information and more choice obviously increases consumer welfare. But we have also shown that the requirements of disclosure and compensation may also increase the freedom of telemarketers to reach consumers who would otherwise bury their proverbial phone in the sand.

The states and the Federal Trade Commission (FTC) can do better than the current rush to “don’t call” registries. At a minimum, the FTC should be careful not to preempt the freedom of states

²⁰² See, e.g., Lawrence Lessig & Paul Resnick, Zoning Speech on the Internet: A Legal and Technical Model, 98 Mich. L. Rev. 395, 428-29 (1999); Esther Dyson, Release 2.1: A Design for Living in the Digital Age 172-201 (1998); Petty, *supra* note 3 at 46.

to adopt a market-based compensation system. Indeed, care should be taken to allow the private telephone companies to provide at least a voluntary “outgoing 1-900” system, under which telemarketers would have the option of competing for consumer attention on the basis of offered compensation.

But the time is ripe for us to act nationally. Instead of groaning at the thought of telemarketing calls and embracing consumer interdiction as the only possible policy, we should think of compensated calls as a huge opportunity. If we jettison the unnecessary prohibitions against pre-recorded calls—and thereby intentionally lower the marginal cost of speaking—there is a real possibility that the telephone could become a major conduit for advertising. Have five minutes to spare waiting for your train, why not turn on your cell phone and make some cool hard cash? Instead of asking the rhetorical question of how much we’d be willing to pay to avoid these unsolicited solicitations, we should be able to ask ourselves the consequential question, “How much do we want to be paid?”